90-573

No.

*****

IN THE

SUPREME COURT
OF THE UNITED STATES

*****

OCTOBER TERM, 1990

*****

ARMISTEAD HOMES CORPORATION

Petitioner,

v.

KAREN PINCHBACK

Respondent.

*****

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

*****

PETITION FOR WRIT OF CERTIORARI

*****

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QUESTION PRESENTED

In a case of first impression, involving housing discrimination, should the "futile gesture theory" as previously applied only in employment discrimination cases, be used to find discrimination against the Defendant under 42 U.S.C. 1981 & 1982, where the court found that the Plaintiff never made contact with the Defendant, never viewed the property in question, and never applied to purchase said property.

PARTIES TO PROCEEDING

Karen Pinchback, Plaintiff - Appellee

Armistead Homes Corporation, Defendant - Appellant

Melvin Maeser, Defendant

Roy E. Jones Real Estate, Inc., Defendant - Third Party Defendant

Roy E. Jones, Defendant

Diane Dailey, Defendant

J. R. Diamond, Inc., Defendant

United States of America, Amicus Curiae

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

STATUTES

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland is reported at 689 F. Supp. 541 (D. Md. 1988) and appears at App. 1 of the Appendix hereto.[1] The Order of the United States District Court dated May 8, 1989, entering judgment for the Plaintiff below, Respondent herein, and affirmative

1 Pages of the Appendix are designated "App. (page nos.)."

relief appears at page 69 of the Appendix hereto.

The opinion of the United States Court of Appeals for the Fourth Circuit, No. 89-2117, is not yet officially reported and appears at App. 107.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 6, 1990. This Petition was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. Section 1981 (1982).

> Section 1981. Equal rights under the law
>
> > All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence,

> and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

42 U.S.C. Section 1982 (1982).

> Section 1982. Property rights of citizens
>
> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

STATEMENT OF THE CASE

This is an appeal from the decision rendered by the United States Court of Appeals for the Fourth Circuit, in the case of Pinchback v. Armistead Homes Corporation, No. 89-2117 (4th Cir. July 6, 1990), (App. 107), where the court, affirming the decision of the United States District Court for the District of Maryland, 689 F. Supp. 541 (D. Md. 1988),

(App. 1), relying on the "futile gesture theory" set forth in the employment discrimination case of International Brotherhood of Teamsters v. United States, 431 U.S. 324, 366 (1977), held that the Plaintiff, Pinchback, was entitled to recover against the Defendant, Armistead Homes Corporation, for housing discrimination, under 42 U.S.C. Sections 1981 & 1982.

The proceedings in the trial court involved a complaint by the Plaintiff, Karen Pinchback, against Defendant, Armistead Homes Corporation (hereinafter Armistead), and Defendant, Diane Dailey, complaining that she had been discriminated against because of race in her efforts to purchase a home in the community known as Armistead Gardens. Her action was brought initially pursuant to Title 42 Section 1981 and 1982 and pursuant to Title 42, Section 3601 (Fair

Housing Act). Her claim was also brought pursuant to Article 49B of the Maryland Annotated Code.

A motion for summary judgment was filed on behalf of the Defendant, Armistead, pointing out that Plaintiff had failed to establish any facts that would demonstrate that she had ever applied to Defendant, Armistead, and had been refused. The summary judgment motion was based on the argument that, not having had any contact with Armistead or any of its representatives or agents, and therefore, not having been refused by Armistead or any of its agents, she had no standing to sue. In addition, the motion for summary judgment sought the dismissal of the action pursuant to Title 42, Section 3601 because of limitations. That portion of the summary judgment with regard to Title 42, Section 3601 was granted and the case proceeded on the

Plaintiff's claim under Title 42, Section 1981 and 1982, and under Maryland Annotated Code Article 49B. Subsequently, an additional partial summary judgment motion was made on behalf of Armistead in order to dismiss that part of the Plaintiff's claim brought pursuant to Maryland Annotated Code Article 49B.

The trial court found that the Plaintiff, indeed had not made contact with Armistead, nor any of its agents or its representatives, that Diane Dailey with whom the Plaintiff did have contact was not the agent of Armistead, and that the statements attributed to Diane Dailey by the Plaintiff had no connection with any information conveyed by Armistead to her.

The Defendant, Armistead, argued to the trial court and the intermediate appellate court that the Plaintiff in order to prevail must present evidence to

establish a prima facie case. In order to establish said prima facie case of housing discrimination, the Plaintiff must at least satisfy a modified version of the test applied in Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1038 (2nd Cir. 1979), which was derived from the four part test established by the Supreme Court in the employment discrimination case of McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802 (1973). That test being:

> "(1) That the Plaintiff must be a member of a protected class;
>
> (2) That he applied for and was qualified to purchase housing;
>
> (3) That he was rejected; and
>
> (4) That the housing opportunity remained available."

Pinchback, 689 F. Supp. at 549. (App. 328).

The satisfaction of the elements of this test is the Plaintiff's initial

burden, such satisfaction creating then the inference of discrimination. International Bhd. of Teamsters v. United States at 357, 358 (1977) citing (McDonnell Douglas, 411 U.S. 792, 802 (1973)).

The trial court, stating "it is an issue of first impression whether the futile gesture theory in Teamsters is properly applied in a housing discrimination case," Pinchback, 689 F. Supp. at 553, (App. 53), however, disagreed with Defendant's position and found for the Plaintiff. In so doing, the trial court found that the Plaintiff was within a protected class, and with the pledged assistance of a friend in her down payment, was found to be capable (qualified) of buying the property. Pinchback, 689 F. Supp. at 549-50. (App. 36). As for the other two elements of the test, again, the court skirted them

with its employment of the "futile gesture theory," whereby it found that the Plaintiff "would have applied to live at Armistead but for the discrimination" (supported by the finding that Dailey was a reliable source of information regarding her single discriminatory communication), Id. at 554, (App. 56, 57), and that the Plaintiff "would have been discriminated against had she applied" (supported primarily by the testimony evidence of Ms. Ward and Ms. Conant). Id. (App. 58). Thereafter, the Defendant appealed and the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the United States District Court for the District of Maryland with regard to the application of the "futile gesture theory."

ARGUMENT

The trial court below stated "It is an issue of first impression where the

futile gesture theory annunciated in Teamsters is properly applied in a housing discrimination case." Pinchback, 689 F. Supp. at 553. The court, therefore, acknowledged that the "futile gesture theory" had never previously been applied to a housing discrimination case. By extending the application of the futile gesture theory to a housing discrimination action, this case, for the first time, vastly enlarges the group of persons who have standing as potential plaintiffs in a housing discrimination case beyond any test for standing previously established in such matters.

It is urged that if the decision sought to be reviewed herein is allowed to remain, it will set a precedent for actions concerning housing discrimination far beyond the bounds previously established by this court and intermediate appellate courts.

No court in this land has ever applied the futile gesture theory in a housing discrimination case in order to afford the plaintiff standing to sue when the plaintiff failed to apply for the housing in question. It is pointed out that this Court's decision in International Brotherhood of Teamsters v. United States, from which the futile gesture theory was derived, was decided by this Honorable Court in 1977. Thereaftar, no court in this land saw fit to apply the futile gesture theory to a housing discrimination case until the United States District Court for the District of Maryland in the instant matter, and its application was affirmed by the decision of the United States Court of Appeals for the Fourth Circuit, on July 6, 1990, which your Petitioner now petitions this Honorable Court to review.

It is urged that there is a very good reason why, during all those intervening years, the futile gesture theory was never applied to a housing discrimination case. The cases in which the futile gesture theory has been applied have always been employment discrimination cases and have always been those where the plaintiff has had some prior contact with the defendant in order that the plaintiff could show that the employer's intention to refuse the plaintiff's application for employment was conveyed by the employer to the plaintiff in some fashion.

Accordingly, the number of potential plaintiffs under that situation was reasonably confined to a finite number of people who had sufficient contact with the employer to be reliably apprised of the employer's discriminatory policy. This is vastly different than a housing discrimination case where the potential

plaintiff is not in a definable group and can be any member of the general public who hears by rumor or newspaper article which the potential plaintiff considers authoritative. The decision as it now stands will enable the person to become a plaintiff, even though there was never any contact between the plaintiff and the potential defendant.

To allow this legal precedent to stand raises many problems, not the least of which would be where a potential defendant had revised its practices and no longer had a discriminatory policy. Nevertheless, the potential plaintiff, having obtained information through sources that the potential plaintiff considered authoritative, based on past practices of the defendant, would, therefore, have the right under this precedent to bring his action.

If this Honorable Court were to allow the decision in the instant matter to

stand, it would create a precedent inconsistent with previous holdings of this Court. The Court's attention is invited to its previous decision in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1965). In that case, this Honorable Court denied the plaintiff standing to challenge the Lodge's allegedly discriminatory membership practices because he "was not injured by [the] membership policy since he never sought to become a member." The Court pointed out that while it was possible that the plaintiff, Irvis, would be subjected to discriminatory action should he apply, until he does so his potential injury is no more immediate or real than that of any other concerned citizen.

It is urged that the rationale of this Honorable Court in Moose Lodge is precisely the rationale argued by your Petitioner herein in the trial court and

the appellate court below.

The decision of the appellate court below is further contrary to the position as stated by this Court in Texas Department of Community Affairs v. Burdine. In that case, in an employment discrimination case, this Court stated "the burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of evidence that she applied for an available position for which she is qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

Additionally, there are many decisions by intermediate federal appellate courts from the various circuits in employment discrimination cases which hold that a showing that the plaintiff applied for the position in

question is a prerequisite to perfecting their claim against the defendant. The Court's attention is invited to Jackson v. Dukakis, 526 F.2d 64, 66 (1st Cir.1975), where the court quoted from Moose Lodge, in determining that the plaintiff must show that he applied in order to prevail in his case. The United States Court of Appeals for the Ninth Circuit in Gay, v. Waiters' and Dairy Lunchmen's Union Local No. 30, 694 F.2d 531 (1982), not only found that the plaintiffs' failure to apply for the position in question was fatal to his claim, but the court also found, that absent his application, he had failed to demonstrate a prima facie under Section 1981 and, therefore, the court need go no further in the case. Gay, 694 F.2d at 539. It is further interesting to note that the plaintiff in Gay similarly to Pinchback in the instant matter, argued

the futile gesture theory as enunciated in Teamsters to circumvent the requirement of having applied for the position in order to establish its prima facie case. The court in Gay rejected that argument and stated:

> Somewhat similarly, the waiters argue that under Teamsters they need not have applied for the position at all, in writing or otherwise, because they were deterred from doing so. This argument is also unpersuasive. Teamsters, a class action, provides a limited exception to the rule that the plaintiff in a disparate treatment lawsuit must demonstrate that he or she applied for the position sought. The necessary prerequisite to such a claim is proof of a 'consistently enforced discriminatory policy' which discourages applicants from even attempting to apply.

Gay, 694 F.2d at 546 citing (Teamsters, 431 U.S. at 365).

CONCLUSION

WHEREFORE, for the reasons above stated, the Petitioners respectfully

submit that a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. B-81-1334

KAREN PINCHBACK

v.

ARMISTEAD HOMES CORPORATION,
DIANE DAILEY

Filed: June 23, 1988

Leslie L. Gladstone, Esq., of Baltimore, Maryland, and Kerry Alan Scanlon, Esquire, of Washington, D.C., and Robert F. Leibenluft, Esq., and William A. Bradford, Jr., Esq., and Bradley Saxton, Esq., of Washington, D.C. for plaintiff.

Bernard J. Sevel, Esq., and Marc K. Sloane, Esq., of Baltimore, Maryland for defendant Armistead Homes Corporation.

BLACK, DISTRICT JUDGE.

Plaintiff Karen Pinchback[1] brings this action against defendants Armistead Homes Corporation ("Armistead") and Diane Dailey, alleging that defendants discriminated against her on the basis of

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1 Since the filing of this action, plaintiff has taken the surname of Bowman. To avoid confusion with the pleadings and other papers filed in this case, the Court will continue to refer to plaintiff by her former name, Pinchback.

race in the sale of housing by depriving her of a residence in the Armistead Gardens development in Baltimore, Maryland. The court has conducted a bench trial in this case and herein states its findings of fact and conclusions of law. Pinchback states causes of action under 42 U.S.C. Sections 1981 and 1982 and under Section 25 of Article 49B of the Annotated Code of Maryland.[2] Armistead has filed a third-party complaint against Roy E. Jones Real Estate, Inc., ("Jones Real Estate"), Dailey's former employer, in which it seeks indemnification. Jones Real Estate was originally sued by Pinchback as well, but Pinchback entered into a Consent Decree with this party, as well as with Roy E. Jones and Diamond Realty, Inc.,

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2 Plaintiff's original complaint also included a count under the Fair Housing Act of 1968, 42 U.S.C. Section 3604. The Court dismissed this count on statute of limitations grounds.

which released these three parties from being defendants in this case. Melvin Maeser, Armistead's former general manager, was also originally sued by Pinchback, but she dismissed her case against him on the first day of the trial. At trial, neither Dailey nor a representative of Jones Real Estate was present to defend their respective interests, and the Court directed the Clerk to enter a default against these two parties.

FINDINGS OF FACT

I.

On February 14, 1980, Pinchback, who is black, read a classified advertisement in the Baltimore Sun for a house for sale. At the time, Pinchback was interested in buying a house with her then-husband, Charles Pinchback. The advertisement, in relevant part, read as follows:

ROY E. JONES

ONLY $12,000! The buy of the day! Fantastic starter home. Very little needed to buy. Owners will finance. 682-2060.

No mention was made in the advertisement of who owned the house or where it was located. The phone number listed in the advertisement was that of Jones Real Estate, the third-party defendant in this case.

Finding the advertised property appealing, Pinchback responded to the advertisement by telephoning Jones Real Estate on the evening of February 14. She reached an answering machine and left a message indicating her name, telephone number, and that she was responding to the advertisement. The next day, February 15, 1980, Dailey, a real estate agent then employed by Jones Real Estate, returned Pinchback's call. Dailey and Pinchback discussed the advertised property. Dailey informed Pinchback that

the house was located in Armistead Gardens. Dailey further informed Pinchback that she would only have to pay $1,000 for the down payment and that the financing payments would be $230.00 per month. The two women arranged to meet the following day, Saturday, February 16, at noon at Jones Real Estate, so that Dailey could take Pinchback to see the house. Dailey gave Pinchback the address of the Jones Real Estate office.

On the 16th, Pinchback and her husband attempted to drive to Jones Real Estate for the noon appointment with Dailey. Unfortunately, they lost their way. Unable to find Jones Real Estate, Pinchback and her husband returned home. Upon her return home, Pinchback called Dailey to make another appointment to see the house. The Court finds that, in substance, the following conversation then took place. After hearing Pinchback's request for another

appointment to see the house, Dailey asked Pinchback whether she was black. Shocked, or in her words, "torn apart," by the question, Pinchback responded that she was black. Dailey then said that she was sorry, but that it was Armistead's policy that blacks were not allowed in the community. At trial and in her deposition, Pinchback had some difficulty remembering the precise exchange between herself and Dailey. The Court, however, finds her to be a highly credible witness, and the substance of this critical testimony is accepted as true. Thus, it is the Court's findings that Dailey did in fact inform Pinchback that it was Armistead's policy that blacks were not allowed in the community. The Court further finds that Pinchback relied on this information and never pursued living in Armistead Gardens any further.

Dailey did not inform Pinchback of the application procedure at Armistead.

Nor did Dailey specify whether she was representing a single homeowner in Armistead Gardens or Armistead itself. After stating Armistead's racial policy, Dailey offered to show Pinchback some other houses. Pinchback accepted the offer, and they arranged to view several other houses that weekend.

Pinchback was led to believe that Dailey was a representative of Armistead by Dailey's reference to Armistead's racial policy. The Court does not find, however, that an Armistead representative directly conveyed any information to Dailey about a discriminatory policy at Armistead. Dailey did have a conversation with Mary Reynolds, Armistead's transfer agent, in which Reynolds informed Dailey of the procedures for purchasing a leasehold interest at Armistead Gardens.

Pinchback met with Dailey to view several other houses that weekend, none

of which were in Armistead Gardens. Pinchback did not like any of the houses that she was shown. After seeing the houses that weekend, Pinchback and Dailey had no further contact.

In February, 1980, Pinchback was employed and earned approximately $102.50 per week, before taxes. Pinchback's husband was also employed, and he earned approximately $200.00 per week, after taxes. Pinchback testified that a friend could have assisted her in making a down payment on a house.

Pinchback and her husband were paying rent of $285.00 per month in February of 1980. The pair separated in September of 1980. Pinchback paid rent of $301.00 per month between the years 1981 and 1984. Starting in 1985, Pinchback's rent increased to $378.00 per month. Pinchback testified that on November 1, 1987, her rent would increase to $404.00 per month.

II.

Armistead is a cooperating housing development that was formed in 1955. The property commonly known as Armistead Gardens was purchased from the federal government in 1956. The corporation is not designed to make a profit and exists to serve the Armistead Gardens community. There are 1,518 individual leasehold properties located in Armistead Gardens. Each leasehold owner holds a certificate of membership in Armistead and is referred to as a "member." Armistead -- not the members -- owns the real estate. Each member receives initially a ninety-nine year lease with a right to renew. Members pay monthly charges to Armistead for electricity, water, gas and repair work. Armistead has a Board of Directors and several committees, including a Membership Committee. The Board, elected by the entire Armistead membership, and

all committees are comprised solely of members. The Board of Directors holds monthly meetings open to all members. Board meetings are taped by the Secretary of the Corporation.

When a member desires to sell or transfer his leasehold interest, he may contact a real estate agent to assist in locating a buyer, or he may locate a buyer himself. Armistead does not directly assist members in the sale of their leasehold interests but, at the request of a member, Armistead will put a property to be sold on a "for sale list" that is kept at the Armistead office in Armistead Gardens. The "for sale list" is maintained by the transfer agent, an employee of Armistead. Once a buyer is found, the member must give Armistead the opportunity to exercise the right of first refusal that it holds under the By-Laws of the Corporation. The By-Laws give Armistead thirty days after being

informed of the price a buyer is willing to pay to match the buyer's offer. Armistead need not be given this opportunity, however, if the sale or transfer is to an immediate family member.

In addition to the right of first refusal, Armistead makes the final determination whether a prospective buyer may become a member of Armistead, and thereby, be able to own a leasehold interest. Once a member has found a prospective buyer to whom he is willing to sell, Armistead requires that the prospective buyer fill out a membership questionnaire form. In the form the prospective buyer is asked to provide information about his residential history, his current employment and income, his savings and credit, his family composition, and references. The prospective buyer must also pay $30.00 for the review of his application, half

of which is paid to the Credit Bureau of Baltimore for a credit check of the prospective buyer, and half of which is paid to those members of the Membership Committee that interview the prospective buyer.

When the Membership Committee receives an application from a prospective buyer, typically two members of the Committee arrange to meet the prospective buyer at his home. The purpose of the meeting is to get to know the prospective buyer and to see how he lives. There are no written criteria for reviewing prospective buyers. One Board member, Melvin Maeser, testified that "they look for people who will fit into the community." If the Committee approves a prospective buyer, that person must still meet the Board of Directors' approval before he can become an Armistead member.

Once a prospective buyer has been approved by the Membership Committee and the Board of Directors, settlement can occur. At settlement, which is attended by the buyer, the seller, and an Armistead representative, the buyer and the seller enter into a leasehold agreement, and the buyer is given a copy of the purchase agreement and a membership certificate. As part of the leasehold agreement, the buyer agrees to adhere to the provisions of a document known as the Conditions of Dwelling Leaseholds. These conditions may be altered by the Board from time to time, so that it is possible that a new leasehold owner may be subject to different conditions than were imposed on the prior leasehold owner.

The leasehold interest in the advertised property in Armistead Gardens concerning which Pinchback called Jones Real Estate was at that time owned by

Kathleen Ziemski. Ziemski had contracted with Jones Real Estate to have the property listed for sale. Ziemski was offering to sell the leasehold interest for $12,000, with a $1,000 down payment.

III.

Armistead Gardens is, and always has been a white community. While there have been several black people who have lived in Armistead Gardens, and there have been several black employees of Armistead, to this day there has never been a black leasehold owner at Armistead Gardens. This is true even though there are several black neighborhoods adjacent to Armistead Gardens. These facts are relevant to plaintiff's claim, although they do not necessarily indicate that Armistead has been discriminating against blacks. There are a number of virtually all-white neighborhoods in the Baltimore area that border virtually all-black neighborhoods, and this alone does not

prove discrimination by the white neighborhood or, for that matter, by the black neighborhood. Of course, Armistead Gardens is more than just a neighborhood; it is a cooperative housing development where the members, through the Membership Committee and the Board of Directors determine who is, and who is not, permitted to become an Armistead leasehold owner.

The Court was presented with little evidence establishing that Armistead actually refused to approve the leasehold application of a black person. The testimony of Aaron McRae, a Housing and Urban Development investigator, was the only evidence presented by plaintiff directly on this issue.[3] McRae testified

3 The Court was also presented with evidence that, in 1983, a Hearing Examiner of the Maryland Commission on Human Relations found that Armistead had unlawfully discriminated against Lorenzo Buckner, a black male, on the basis of race, by depriving him of the opportunity to live in Armistead Gardens in 1975. The Court admitted this evidence solely

on cross-examination that in the course of investigating plaintiff's claim, he phoned the Armistead office manager and was told that blacks had applied to live in Armistead Gardens but that none had been approved. Highly compelling evidence was presented, however, demonstrating that had black prospective buyers submitted membership applications to live at Armistead Gardens, they would have been refused membership because of their race. The bulk of this evidence was presented through the testimony of Diana Lynn Ward and Margie Conant, two Armistead members.

Ward has been an Armistead leasehold owner since August of 1981. She also lived in Armistead Gardens as a child for four years, and she lived there from 1975-77 as well. Ward served on the

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for the purpose of demonstrating that defendant was on notice regarding allegations of racial discrimination at the time the incidents concerning the plaintiff in this case took place.

Armistead Board of Directors from June of 1983 until June of 1987. For two of her years on the Board, Ward was Vice-President of the Corporation, and for one year, she served as the Corporation's Secretary. Ward also served on the Recreation Committee from 1982-87. Ward testified unequivocally that every Board of which she has been a member has discussed how to keep blacks out of Armistead Gardens. Specifically, Ward recounted the following incidents.

Ward testified that when she purchased her leasehold interest in 1981, Dailey was the listing agent who assisted her in the purchase. At the closing, Ward recounts that either Dailey or Jack Funari, then an active Board member, told Ward that she did not have to worry, because there were "no niggers in Armistead." Ward testified that, at several Board meetings in 1975 and 1976, Board members discussed the effect of the

posting of signs by realtors in yards in Armistead Gardens indicating houses for sale, and that the Board members were concerned that such signs would lead to blacks wanting to live in Armistead Gardens.

Ward testified that while she was on the Recreation Committee, she was responsible for scheduling functions at a meeting hall on the Armistead property. On one occasion a Mrs. Brown, who was a white nonmember who had a member sponsoring her to allow her access to the hall, wanted to use the hall to have a function at which blacks would be in attendance. Ward testified that she heard Funari, a Board member, tell Brown that it would be over his "dead body" that "niggers" would be allowed to use the hall.

Ward also testified that she was present in the Armistead office with Funari when a black person came in to

inquire about available housing at Armistead Gardens. After the inquirer was told that she would have to pursue obtaining a house from a current leasehold owner, Ward asked Funari why the inquirer was not told about the existence of a fund to assist her with financing. Funari responded that "we don't need any niggers."

Ward testified that several leasehold owners threatened Fred James, then the President of the Armistead Board, that they would sell their property to blacks, and that on each occasion James responded that they would have to go through the membership review and the credit check first, clearly implying that they would not successfully do so. Ward also testified that in 1984 or 1985, the then Board President, Bert Jones said, in reference to Pinchback's case that "if we don't beat this case, we'll have every nigger in Baltimore coming here."

Ward testified that the Board took precautions not to memorialize certain portions of their discussions; the tape recorder that was otherwise operating during Board meetings was turned off when this case or blacks generally were being discussed. Ward specifically recalls an off-the-record meeting about this case that was held directly after a regular Board meeting. Ward also recalls that the tape was erased on one occasion after a Mr. Schultz used the word "nigger."

The Court recognizes that Ward would appear to bear a grudge against Armistead and certain Armistead members. Ward testified that Armistead is divided into two political factions and that in a recent Board election Ward was ousted from her place on the Board. On cross-examination, it was revealed that Armistead sought and obtained an injunction in the Circuit Court for Baltimore City to prevent Ward from

entering Armistead's corporate officers. Ward also testified that she is upset that Armistead will not allow her to enclose her yard to protect her autistic son, and that Armistead has failed to repair her roof that is "caving in." The Court finds, however, that rather than demonstrating a lack of credibility, Ward's state of mind led her to "turn in" her fellow members. The Court found Ward to be credible, and her testimony as recounted herein is accepted as fact.

The Court also found Margie Conant, another Armistead Board member who testified as to a number of racially offensive remarks concerning keeping blacks out of Armistead, to be credible. Conant has lived in Armistead Gardens since 1961 and has served on the Board since 1968, except for a three-year period. Conant served as President of the Corporation between July, 1986 and June, 1987, and she has served as Vice-

President, Secretary, Assistant Secretary, Treasurer, and Assistant Treasurer. Conant has attended virtually all Board meetings since she has been on the Board. Conant testified that on a number of occasions at Board meetings, members would state their opinions about keeping blacks from becoming leasehold owners at Armistead.

Specifically, Conant testified that approximately one and a half years ago, Board member Gloria Fernandes, stated in a board meeting -- in connection with a discussion of this case -- something to the effect of "we don't want any blacks in Armistead." Conant testified that over two years ago, Tony Schultz Anton, a Board member at the time, voiced the same concern in a Board meeting, although not in reference to this case. Conant further testified that both Fred James, while President of the Corporation, and Lillie May Evans, while a Board member,

stated that blacks had to be kept out of Armistead.

Conant also testified that because all of these comments took place during Board meetings, they all should have been recorded. Conant stated that she does not know whether the comments are still on tape but knows that there were occasions when the President or the Secretary of the Corporation ordered that the tape be erased. Conant recalls one such occasion when Fernandes commented on keeping blacks out of Armistead. Since the Court found Conant's testimony extremely credible, her testimony as recounted is accepted as fact.

The Court also finds that the following incident occurred. In August of 1984, Teresa Coursey, then a leasehold owner at Armistead Gardens, decided to sell her property. She contacted Helen Poska, the editor of The Representative, a local newspaper, about running an

advertising regarding the sale of her leasehold interest, While not directly connected with Armistead, The Representative printed the Armistead Board minutes and frequently printed advertisements of property for sale in Armistead. Poska was a member of the Armistead Board at the time and has served on the Board for seventeen of the last twenty years. After Coursey told Poska how the advertisement should read, Poska asked Coursey what she would say if a black applied. Coursey was shocked by the inquiry and responded that she would treat a black applicant no differently from a white applicant.

Armistead called Melvin Maeser and Helen Poska, two long-time Armistead Board members, as witnesses to rebut Ward's and Conant's testimony regarding the collective attitude and specific remarks of Armistead Board members about keeping blacks out of Armistead. The

Court did not find Maeser's flat denial that such statements took place in his presence at Board meetings to be credible. Nor did the Court find Poska's statement that, other than the remark attributed to Gloria Fernandes by Margie Conant, there were no such statements uttered in her presence at Board meetings to be credible. The Court places their testimony with the more blatantly incredible deposition testimony of Lillie May Evans who confirmed that in the twenty-five years that she has lived in Armistead Gardens, she has no recollection of ever speaking to any other Armistead Gardens resident about anything having to do with race or blacks.

The Court accepts as fact the testimony of Audrey Moffitt, Armistead's current office manager, regarding the application of Robert Brown, a black prospective buyer. According to Moffitt,

Brown's membership was approved in 1984, but sometime after approval, Brown's white girlfriend bought the property in question. The Court notes that while Moffitt did state that an investigation was done on the application and that it was approved, it is unclear whether Brown was visited by members of the Membership Committee or whether he subsequently received the approval of the Membership Committee and the Board of Directors.

During the years 1979, 1980 and 1981, the Armistead Board consisted of between fifteen and eighteen members. Fred James was President of the Corporation all three years. Lillie May Evans was Assistant Secretary all three years. Helen Poska was a Board member for the years 1979 and 1980. Jack Funari and Gloria Fernandes were Board members in 1981. During the same three years, the Membership Committee consisted of two people in 1979, three people in 1980 and

five people in 1981. For all three years, Lillie May Evans was on the Committee, and in 1979 and 1980, she served as the Committee's Chairperson. In 1981, Jack Funari was also on the Committee.

Pinchback has not established how each member of the Membership Committee or the Board of Directors would have acted on Pinchback's application had she applied. No such showing is necessary, however. Based on the testimony adduced at trial, the Court finds that the Armistead Board as a collective group was hostile to blacks at the time Pinchback was interested in purchasing property in Armistead Gardens. Thus, the Court finds that had Pinchback applied to live at Armistead Gardens, she would have been denied membership because she is black.

The Court also received evidence regarding the racial reputation of Armistead Gardens in the community.

Plaintiff introduced into evidence the notes of HUD investigator's McRae's meeting with Dailey and the office manger of Jones Real Estate. The meeting took place on August 8, 1980. McRae's notes indicate that the office manager stated that she "had heard through the years of Armistead Gardens all-white population, but didn't know it for a fact." In deposition, Melvin Maeser, a long-time resident of Armistead Gardens, stated that Armistead Gardens "is basically known as a white community." At trial, Maeser elaborated on his deposition remark and said that before he came to Armistead Gardens, he had heard it was a place for "poor white trash; white hillbillies." Based on this evidence, the Court finds that, to the extent a development possesses a reputation in the community, at all times relevant to this case, Armistead Gardens had a reputation for being all-white.

CONCLUSIONS OF LAW

Pinchback asserts causes of action under 42 U.S.C. Sections 1981[4] and 1982[5], and under Article 49B of the Annotated Code of Maryland[6]. To prevail against

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4 42 U.S.C. Section 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

5 42 U.S.C. Section 1982 provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

6 Section 25 of Article 49B of the Annotated Code of Maryland Provides:

It shall be unlawful to coerce, intimidate. threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in

Armistead under any of these claims, Pinchback must prove by a preponderance of the evidence that Armistead deprived her of the opportunity to acquire property at Armistead Gardens, and that Armistead did so because Pinchback is black. Armistead strenuously argues that because Pinchback never applied to Armistead, she has failed to make a prima

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the exercise or enjoyment of, any right granted or protected by Section 20, Section 21, Section 22, or Section 23 of this article. This section may be enforced by appropriate civil action.

Section 20(a)(1) provides:

(a) It shall be an unlawful discriminatory housing practice, because of race, color, religion, sex, national origin, marital status, or physical or mental handicap, for any person having the right to sell, rent, lease, control, construct, or manage any dwelling constructed or to be constructed, or any agent or employee of such person:

(1) To refuse to sell or rent after making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling.

facie showing of discrimination against her by Armistead.[7]

In support of its position, Armistead offers a four-part test for establishing a prima facie case of housing discrimination. The test is a modified version of the one employed by the United States Court of Appeals for the Second Circuit in Robinson v. 12 Lofts Realty,

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7 Armistead has not asserted that Pinchback lacks standing to sue. Because the standing doctrine limits the subject matter jurisdiction of this Court whether it is raised by a party or not, and because the facts of this case naturally call Pinchback's standing into question, the issue must now be addressed. While the standing doctrine as developed by the Supreme Court is multi-faceted, it would appear that the only facet at issue in this case is whether Pinchback has alleged personal injury fairly traceable to Armistead's unlawful conduct, so as to satisfy the Article III case and controversy requirement. Allen v. Wright, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556, 570 (1984). At the risk of putting the cart before the horse, the Court will not now embark on an analysis of Armistead's liability, in which the Court finds Armistead liable for the discriminatory injury suffered by Pinchback. Because the Court so finds, the Court a fortiori finds that Pinchback has standing to bring this action.

Inc., 610 F.2d 1032, 12038 (2d Cir. 1979), which was derived from the test established by the Supreme Court in the seminal employment discrimination case of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L.Ed.2d 668, 677 (1973):

> (1) That the Plaintiff must be a member of a protected class;
> (2) That he applied for and was qualified to purchase housing;
> (3) That he was rejected; and
> (4) That the housing opportunity remained available.

Armistead would have the Court simply apply this test, find that at least one of the elements has not been established, and rule in favor of Armistead.

In adopting this position, Armistead had failed to grasp the purpose of the prima facie test in discrimination cases. The purpose of the McDonnell Douglas test is to allow the plaintiff the opportunity to create a rebuttable inference of discrimination, without necessarily offering any direct proof of

discrimination. Significantly, the elements of the test are not fixed. As the Supreme Court said in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358, 97 S. Ct. 1843, 1866, 52 L.Ed.2d 396, 429 (1977), another employment discrimination case, "[t]he importance of McDonnell Douglas lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." Moreover, as the United States Court of Appeals for the Fifth Circuit reasoned, "courts must not allow the mechanical formula to blind them to the real issue of whether the defendant illegally discriminated against the plaintiff. . . . In the rare

situation in which the evidence establishes that an employer openly discriminated against an individual, it is not necessary to apply the mechanical formula of McDonnell Douglas to establish an inference of discrimination; the showing has already been made." Ramirez v. Sloss, 615 F.2d 163, 168 (5th Cir. 1980).

There is no question that Pinchback must establish two threshold facts in order to prevail in this case. If she is not a member of the protected class, or if she was not a bona fide buyer at the time she inquired about the home in Armistead Gardens, she cannot recover. Pinchback, as a black person, is indeed in the protected class. Whether she was a bona fide buyer at the time of inquiry will be addressed shortly. The central issue, however, is what else must Pinchback prove? The Court has found that Armistead would have denied

Pinchback membership on the basis of her race had she formally applied to Armistead. The Court has also found that Pinchback did not formally apply for membership at Armistead. In fact, Pinchback had no direct contact whatsoever with the Armistead Gardens property or any Armistead members or employees. Armistead would have the Court require that Pinchback prove that she applied to live at Armistead. In the Court's view, such a requirement is too inflexible and is inconsistent with the dictates of McDonnell Douglas and its progeny. The real issue is whether Armistead actually discriminated against Pinchback, and that is what she must prove to prevail in this case.[8]

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8 Having focused directly on what Pinchback must prove to prevail in this action, the Court need not engage in the standard three-stage proof scheme set forth in McDonnell Douglas.

Before reaching this issue, the Court must consider whether Pinchback was a bona fide buyer at the time she inquired about the leasehold interest for sale at Armistead. In February of 1980, the Ziemski property was for sale for $12,000, with a $1,000 down payment. The remainder of the amount was to be paid off at a rate of no more than $230.00 per month. Pinchback was then employed at a rate of $102.50 per week, before taxes, and her husband was employed at a rate of $200.00 per week, after taxes. Pinchback testified that a friend was prepared to assist her in making a down payment. As it appears that Pinchback and her husband were earning over four times the $230.00 monthly payment and had a friend available to assist with a down payment, the Court finds that Pinchback was capable of buying the property in question. Additionally, given the excess of Pinchback's and her husband's income

over the monthly payment, the Court finds that Pinchback had the means to make the monthly payments to Armistead for electricity, water, gas and repair work.

Turning now to the critical issue in this case, Pinchback articulates three theories in support of finding Armistead liable for discrimination against her in the sale of housing on the basis of race. First, Pinchback asserts that Dailey was an agent -- either actual or apparent -- of Armistead and that Dailey's remarks to Pinchback should therefore be attributed to Armistead. Second, Pinchback argues that the Court should adopt a line of authority in the employment discrimination field, beginning with the case of International Brotherhood of Teamsters v. United States, 431 U.S. 324, 366, 97 S. Ct. 1843, 1870, 52 L.Ed.2d 396, 434 (1977), holding that where application for a position would be a futile gesture, nonapplication is not a

bar to recovery. Under the Teamsters approach, Pinchback asserts that so long as she proves that she would have applied but for the discrimination and that she would have been discriminatorily rejected had she applied, she should be on equal footing with an actual applicant. Third, Pinchback contends that Armistead proximately caused the injuries suffered by her and that on this basis, Armistead should be held liable for discrimination under the asserted statutory claims.

Beginning with plaintiff's agency theory, there is no question that at the time Dailey talked to Pinchback in February of 1980, she was already acting as the agent of two principals: Jones Real Estate, her employer, and Kathleen Ziemski, the owner of the property for sale in Armistead Gardens. Pinchback would have the Court find that Dailey served yet another principal in

Armistead, either as an actual agent or an apparent agent.

An actual agency exists when there is a "fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." In re Shulman Transport Enterprises, Inc., 744 F.2d 293, 295 (2d Cir. 1984) (quoting Restatement (Second of Agency Section 1(1) (1958). In contending that such a relationship existed between Armistead and Dailey, Pinchback focuses on Armistead's interest in its members transferring their property. It is undisputed that Armistead played a role in the leasehold transfer process. It employed a transfer agent who provided information to members, realtors and prospective buyers regarding the transfer process. It kept a list of properties for sale at its

office. It reviewed the prospective buyers to determine whether they were worthy of credit and were suitable persons. It played an active role in the settlement and, as Pinchback stressed at trial, had the ability to alter the Conditions of Dwelling Leaseholds document so that a new leasehold owner could agree to different terms with Armistead than existed between the prior owner and Armistead. In essence, Pinchback argues that because Armistead played an active role in the transfer process and because it was in Armistead's interest to have the leasehold transfers occur, that therefore Dailey acted as agent for Armistead as well as Ziemski.

The record, however, is devoid of any evidence that Armistead consented to have Dailey act on its behalf and subject to its control or that Dailey agreed to act on behalf of Armistead and subject to its control. Armistead's interests may have

been consistent with those of Ziemski or Roy Jones Realty, but that does not make Dailey an agent of Armistead. Accordingly, the Court does not find that Dailey served as Armistead's actual agent in the sale of the Ziemski property.

Whether Dailey served as an apparent agent of Armistead, rather than an actual agent, depends on different considerations. "Unlike actual agency, which exists whether or not the third party knows of or suspects an agency relationship, apparent agency depends in large part upon the representations made to the third party and upon the third party's perception of those representations." Williams v. Washington Metropolitan Area Transit Authority, 721 F2d 1412, 1416 (D.C. Cir. 1983). "Apparent authority exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized.

Further, the third person must believe the agent to be authorized." Id. at n.7 (quoting Restatement (Second) of Agency, Section 8 comment c). Significantly, the "creation and termination of apparent authority rests with the principal." Id. at 1417 (emphasis added).

While the Court is prepared to find that Pinchback, after her phone conversation with Dailey, reasonably believed that Dailey was an agent of Armistead, there is no indication in the record that Armistead created this impression in Pinchback's mind. Armistead merely allowed its members independently to attempt to sell their property with the assistance of real estate brokers. The fact that Dailey gave Pinchback the impression that she was an agent of Armistead, without Armistead affirming this impression in any manner, cannot create a binding agency relationship between Dailey and

Armistead. Thus, the Court does not find that Dailey served as an apparent agent of Armistead in the sale of the Ziemski property.

Pinchback's second theory of liability finds its origin in the Supreme Court decision of International Brotherhood of Teamsters, 431, U.S., 324, 97 S. Ct. 183 52 L.Ed.2d 396. In Teamsters, the United States had brought an action under Title VII in a Tennessee federal court against T.I.M.E.-D.C., Inc., alleging that the company discriminated against blacks in its hiring, assignment and promotion policies at its Nashville terminal. The Government brought a second suit against the same company three years later in a Texas federal court, charging the company with a pattern and practice of employment discrimination against blacks and Spanish-surnamed persons throughout the company's transportation system. The

International Brotherhood of Teamsters was joined as a defendant in the second suit. The two suits were consolidated in the Northern District of Texas.

The district court found that discrimination had occurred and accepted the Government's theory that the affected class of people discriminated against should include all black and Spanish-surnamed incumbent employees who had been hired to fill city operations or serviceman jobs at every terminal that had a line-driver operation. The district court found that members of this class had been injured in different degrees and divided the class into three groups for remedial purposes. Where there was no evidence that an individual class member had been harmed in terms of being deprived of a line-driver job, the district court put that class member in the third of three groups of workers to be considered for line-driver positions.

The United States Court of Appeals for the Fifth Circuit agreed that discrimination had occurred but ruled that the district's court remedial scheme was inadequate. Among other things, the Fifth Circuit did not distinguish on remedial grounds between incumbent employees who had applied for a job and those who had not. The Court held that where there has been a demonstration of class-wide discrimination coupled with a seniority system that perpetuates the effects of the discrimination, a member of the class need not show that he applied for the position from which the class had been excluded. The Court reasoned that "as a practical matter . . . a member of the affected class may well have concluded that an application for transfer to an all white position such as [line driver] was not worth the candle." United States v. T.I.M.E.-D.C., Inc., 517 F.2d 299, 320 (5th Cir. 1975).

Although the Supreme Court vacated the decision of the Fifth Circuit, remanding the case to the district court for an evidentiary hearing on the remedial scheme, the Court agreed with the Fifth Circuit in principle regarding the propriety of relief for those class members who did not apply for the line driver positions. The Court began by citing its prior decisions in Griggs v. Duke Power Co., 401 U.S. 424, 429-430, 91 S. Ct. 849, 853, 28 L.Ed.2d 158, 163 (1971) and Albemarle Paper Co. v. Moody, 422 U.S. 405, 417, 95 S. Ct. 2362, 2371, 45 L.Ed.2d 280, 296 (1975), in which the Court noted that "a primary objective of Title VII is a prophylactic: to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees." Teamsters, 431 U.S. at 364, 97 S. Ct. at 1869, 52 L.Ed.2d at 433. Referring again to Albemarle, the Court

then stated that district courts have "not merely the power but the duty [under Title VII] to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar likely discrimination in the future." Id. (quoting Albemarle Paper Co., 422 U.S. at 418, 95 S. Ct. at 2372, 45 L.Ed2d at 297). Mindful of this statutory mandate, the Court reasoned as follow:

> The effects of and the injuries suffered from discriminatory employment practices are not always confined to those who were expressly denied a requested employment opportunity. A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection.
>
> If an employer should announce his policy of discrimination by a sign reading "White Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can

> be communicated to potential applicants more subtly but just as clearly by an employer's actual practices -- by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he had discriminatorily excluded members of minority groups. When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.

431 U.S. at 365-66, 97 S. Ct. at 1870, 52 L.Ed.2d at 433-34. The Court went on to say, however, that a nonapplicant must demonstrate that he was a potential victim of unlawful discrimination. "Because he is necessarily claiming that he was deterred from applying for the job by the employer's discriminatory practices, his is the not always easy burden of proving that he would have

applied for the job had it not been for those practices." 431 U.S. at 367-68, 97 S. Ct. at 19=871, 52 L.Ed.2d at 435. Put another way, the Court stated that "[r]esolution of the nonapplicant's claim . . . requires two distinct determinations: that he would have applied but for the discrimination and that he would have been discriminatorily rejected had he applied." 431 U.S. at 368, 97 S. Ct. at 1871, 52 L.Ed.2d at 436 n.52. In keeping with this approach, the Court remanded the issue of the nonapplicant class members; remedial claims for a determination as to each individual's allegedly squelched desire for a line-driver position.

The "futile gesture" theory enunciated in Teamsters has been employed by numerous courts in employment discrimination cases to grant nonapplicants applicant status where the nonapplicant can demonstrate that he was

deterred from applying because of discrimination and that had he applied, he would have been discriminatorily rejected. White v. Carolina Paperboard Corp., 564 F.2d 1073, 1086 (4th Cir. 1977); Equal Employment Opportunity Commission v. Sheet Metal Workers, International Association, Local No. 122, 463 F. Supp. 388, 424-26 (D. Md. 1978) Miller, J.) (Sheet Metal Workers). The theory has been applied in individual as opposed to class actions, and it has been applied with regard to liability, rather than in the remedial context. Burkey v. Marshall County Board of Education, 513 F. Supp. 1084, 1091 (N.D. W. Va. 1981); See also Rodgers v. Peninsular Steel Co., 542 F. Supp. 1215, 1218-19 (N.D. Ohio 1982) (Theory not applied because plaintiff alleged no awareness of job opportunity in question.). Moreover, the Teamsters approach has been applied by at least one court in a non-Title VII case.

McDermott v. Lehman, 594 F. Supp. 1315, 1323 (D. Me. 1984) (Applied to Age Discrimination in Employment Act claim.).

In several of the cases in which the futile gesture theory has been applied, the nonapplicant has been a current employee who has had an "inside" view of the alleged discrimination. See White, 564 F.2d 1073; Burkey, 513 F. Supp. 1084. In these cases, the issue was whether the nonapplicants, through the information they had obtained about their employers' hiring practices while on the job, had learned that their employers discriminated and that they would have been discriminated against had they applied for the position in question. The same theory has been employed in the situation where the nonapplicant is not a current employee of the employer at issue, but has learned through contact with an agent of the employer that the employer discriminates against a

protected class of which the prospective applicant is a member, and that to apply for the desired position would therefore be futile. McDermott, 594 F. Supp. at 1321-23.

Furthermore, in Sheet Metal Workers, 463 F. Supp. at 423-27, the Teamsters approach was applied where black sheet metal workers sought to demonstrate that a union's reputation among nonunion black sheet metal workers in the building trade was that it discriminated against blacks and that therefore they were deterred from applying for membership. In that case, the issue was whether the information circulating among the nonunion black sheet metal workers about the union was such that it reasonably resulted in their belief that to apply for membership would be a futile gesture because of the union's allegedly discriminatory membership policy. As the Court in Sheet Metal Workers stated, "the

existence vel non of a defendant's reputation for discrimination is a relevant fact in determining whether an individual nonapplicant would have applied to the defendant but for the defendant's discrimination because it buttresses his testimony that he was aware of the discriminatory practices of the defendant." 463 F. Supp. at 426.

The case at bar presents somewhat different legal and factual circumstances than any of the cases outlined above. First of all, the plaintiff in this action has alleged housing discrimination, not employment discrimination. It is an issue of first impression whether the futile gesture theory enunciated in Teamsters is properly applied in a housing discrimination case. The court can see no basis in principle for distinguishing between the prospective employee who claims he was dissuaded from applying for

a job because of the discriminatory practices of an employer, and the prospective resident who claims he was dissuaded from applying for housing because of the discriminatory practices of the seller[9] of the housing. Moreover, because of the wide acceptance of other Title VII principles in housing discrimination cases -- particularly the adoption of the McDonnell Douglas prima facie cases analysis -- it is the Court's view that the futile gesture theory is applicable in the housing discrimination context.[10]

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9 Or, as the case may be, the entity that can control to whom the seller of the property sells.

10 Indeed, the futile gesture theory has been incorporated into the McDonnell Douglas analysis by at least one court:

> Having alleged his deterrence from applying on the basis of the employer's discriminatory practices, it was then necessary in effect for such a plaintiff to substantiate this allegation. The plaintiff needed to show prima facie that he would have

Factually, this case is distinct from any of the three types of cases described above where courts have applied the futile gesture theory. Pinchback was not already affiliated with Armistead in any capacity, so she did not observe Armistead's discriminatory practices firsthand. Nor did Pinchback hear about Armistead's no-black policy directly from an Armistead agent. Nor did Pinchback receive information regarding Armistead's general reputation in the community.[11]

> applied for the relevant position had it not been for those practices. International Brotherhood of Teamsters v. United States, 431 U.S. at 368, 97 S. Ct at 1871. In meeting this burden, he essentially bridges the gap between applicant and nonapplicant, and attains the presumption accorded the former upon fulfillment of the McDonnell Douglas prima facie case.

Rodgers v. Peninsular Steel Co., 542 F. Supp. 1215, 1218-19 (N.D. Ohio 1982).

11 To the extent Armistead had a negative reputation in any part of the community regarding its policy towards blacks, it was that it was an all-white

Pinchback received her information about Armistead from one source -- Dailey.

It is not clear how Dailey received her information regarding Armistead's discriminatory policy. In the Court's view, this is not a critical evidentiary element. By maintaining a policy of discriminating against blacks, Armistead either directly or indirectly caused Dailey to become aware of this policy. Dailey, in turn, accurately conveyed that policy to Pinchback, a bona fide prospective leasehold buyer.

Significantly though, Dailey operated as an information source distinct from firsthand knowledge, or information provided by an agent, or through reputation. The critical question is whether Dailey was reasonably regarded by

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community. Knowledge of this reputation alone, without further knowledge that blacks are not allowed to live in Armistead, would not be sufficient to support a discrimination claim of a prospective applicant who chose not to apply on the basis of this information.

Pinchback as a reliable information source, thereby justifying Pinchback's decision to forego applying to Armistead Gardens. For whether the information source -- be it firsthand knowledge, an agent, reputation, or otherwise -- is reasonably regarded as reliable is a significant consideration that is implicit in all cases in which courts are asked to apply the futile gesture theory.

Dailey was the listing agent for the property. From Pinchback's or any other prospective purchaser's perspective, she was the sole person to contact regarding the advertised property. Moreover, Dailey as a real estate agent, was a person properly assumed by Pinchback to be knowledgeable about local housing restrictions. The Court concludes that Dailey was someone whom Pinchback could naturally be expected to rely on for information regarding a discriminatory housing policy at Armistead.

Accordingly, the Court finds that Pinchback has met her burden of proof in this case, having demonstrated that she would have applied to live at Armistead but for the discrimination, and that she would have been discriminated against had she applied. Armistead therefore is liable to Pinchback under 42 U.S.C. Sections 1981 and 1982, and under Section 25 of Article 49B of the Annotated Code of Maryland.

Pinchback also argues as an alternative basis of liability that Armistead proximately caused the injury she suffered in being deprived of the property in Armistead Gardens because of her race and that, therefore, Armistead should be held liable. Because the Court has already found legal causation under the Teamsters approach, and a determination as to proximate cause was not necessary to that finding, it is not necessary for the Court to consider the

proximate cause issue. In the interest of completeness, however, the issue will be addressed.

As a preliminary matter, courts routinely borrow from common law tort principles in fleshing out the civil rights statutes. Curtis v. Loether, 415 U.S. 189, 196-96, 94 S. Ct. 1005, 1009, 39 L.Ed.2d 260, 267 (1974). In the present case, if intentional discrimination is regarded as an intentional tort, the only outstanding issue is whether Armistead proximately caused the injury suffered by Pinchback. There is certainly no question that Armistead had a duty not to discriminate, that it deliberately breached that duty, and that Pinchback was injured.

While the Court has held that but for Armistead's discriminatory policy Pinchback would have applied for membership at Armistead, cause in fact cannot be equated with proximate cause.

To demonstrate proximate cause there must be a showing that the injury was reasonably foreseeable. Pierce v. United States, 718 F.2d 825, 830 (6th Cir. 1983). In the present case, the Court has no doubt that Pinchback's injury was reasonably foreseeable to Armistead. Armistead carried out a discriminatory policy, fully aware that local realtors frequently visited Armistead and interacted with Armistead members, some of whom were members of the Board of Directors. It was quite foreseeable that a realtor such as Dailey, who served as the listing agent for several Armistead homes, would acquire information about Armistead's policy of preventing black members. And it was no less foreseeable that a realtor such as Dailey would convey this information to a prospective black purchaser such as Pinchback. After all, the information pertained directly to the ability of Pinchback, or any other

black purchaser, to acquire property in Armistead. Accordingly, the Court also finds that under a proximate cause theory, Armistead is liable under the same three statutes -- 42 U.S.C. Sections 1981 and 1982 and Section 25 of Article 49B of the Annotated Code of Maryland.

Armistead makes what amounts to a last-ditch argument to avoid an adverse ruling by invoking the doctrine of release. Armistead asserts that because Pinchback entered into a Consent Decree releasing Roy E. Jones, and that Armistead would be entitled to indemnification from Jones were it not for the release, Armistead must also be treated as having been released. Leasing aside the issue of whether Armistead would be entitled to indemnification from Jones, even if this were assumed to be true, it does not follow that Pinchback cannot recover from Armistead.

Of significance in the present case is that the Consent Decree entered into by Pinchback and approved by the Court specifically states that plaintiff does not release the remaining defendants.[12] With regard to the claims under 42 U.S.C. Sections 1981 and 1982, the federal rule is that "a release of one joint tortfeasor or coconspirator is not a release of others unless the party signing the release intended the others to be released." Locafrance U.S. Corp. v. Intermodal Systems Leasing, Inc., 558

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12 The Consent Decree, approved by the Court on May 3, 1987, provides in relevant part that:

> Plaintiff does not release the remaining defendants, Armistead Homes Corporation, Melvin Maeser and Diane Dailey, from any present or future claims set forth in her Complaint or Second Amended Complaint or elsewhere, nor does this Consent Decree or any provision thereof in any way prejudice or prevent plaintiff from pursuing any present or future claims against such defendants.

F2d 1113, 1115, (2d Cir. 1977). As to the claims brought under Article 49B, by statute in Maryland "[a] release by the injured person of one joint tort-feasor, whether before or after judgment, does not discharge the other tort-feasors unless the release so provides . . . ." Md. Code Ann., Art. 50, Section 19 (1957, 1986 Repl. Vol.). This same statute further provides that any such release reduces the claim against the other tort-feasors by the amount paid for the release. Id. This reduction has no effect here, since it is inapplicable to the damages awarded on the federal claims. Thus, Armistead will not be shielded by the doctrine of release, and relief will be granted.

DAMAGES

Pinchback seeks compensatory and punitive damages, affirmative relief to rectify Armistead discriminatory practices, and attorneys' fees and costs.

Beginning with Pinchback's claim for compensatory damages, her economic loss, if any, has not been established by a preponderance of the evidence. The Court should not speculate as to the duration of her stay in Armistead Gardens or as to the difference between the monthly rent payments Pinchback has made at several apartments since February of 1980, and the housing costs at Armistead Gardens.

The Court will award Pinchback compensatory damages for the humiliation and emotional distress she suffered due to Armistead's discriminatory practices. Pinchback was an earnest, prospective home buyer who was bluntly informed that the color of her skin precluded her from pursuing a leasehold interest at Armistead Gardens. Armistead was responsible for this racists message, and Pinchback clearly suffered injury as a result of it. Accordingly, the Court

will award Pinchback $2,500 in compensatory damages.

The Court next considers whether to award punitive damages. Punitive damages are awarded in federal question cases when a defendant has acted "with actual knowledge that he was violating a federally protected right or with reckless disregard of whether he was doing so." Miller v. Apartments and Homes of New Jersey, Inc., 646 F.2d 101, 111 (3d. Cir. 1981) (quoting Cochetti v. Desmond, 572 F2d 102, 106 (3d Cir. 1978); Cf. Smith v. Wade, 461 U.S. 30, 56, 103 S. Ct. 1625, 1640, 75 L.Ed.2d 632, 651 (1983) (Section 1983 case). Armistead has had a long-standing policy of discriminating against blacks. Armistead continued to implement this insidious policy, even after its first brush with the law in the Buckner case in 1975. It is appropriate, therefore, to attribute to Armistead actual knowledge of its

violation of a federally protected right. At a minimum, Armistead acted with reckless disregard of whether it was violating a federally protected right.

In determining whether to impose punitive damages in this case, however, the Court recognizes the fact that Armistead is a housing cooperative. Accordingly, the burden of any such punitive damages will in all likelihood fall directly or indirectly on the 1,518 members, whether or not they share the racially discriminatory views held by its officers and representatives as reflected in the Court's findings of fact. The Court is also mindful that Armistead will be subject to substantial attorneys' fees as a result of the Court's ruling in this case. In litigation that has continued for more than seven years with 115 pleadings filed in Court and a trial lasting eight days, the Court is confident that Armistead's obligations in

this regard will ultimately far exceed any punitive damages amount appropriate for this case. Accordingly, the purpose of punitive damages will have been accomplished, and no punitive damages will be awarded.

The Court finds that affirmative relief is appropriate in this case. Indeed, it is in this manner that the Court can be most effective in assuring the eradication of racial discrimination in Armistead Gardens. Entry of final judgment in these proceedings will be deferred until the Court has further guidance from the parties as to affirmative relief to be ordered.[13]

---

13 In this regard, the Court has noted the evidence Pinchback presented at trial of an advertising test conducted by Baltimore Neighborhoods, Inc., which demonstrated that when Armistead-type homes were advertised in newspapers with a significant black readership and the advertisements included the words "Equal Housing Opportunity," a number of blacks responded with interest to the advertisements.

Finally, Pinchback is entitled to attorneys' fees and costs.

Judgment will be entered in accordance with this opinion.

June 23, 1988

Walter E. Black, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. B-81-1334

KAREN PINCHBACK

v.

ARMISTEAD HOMES CORPORATION

O R D E R

On June 23, 1988, this Court found that defendant Armistead Homes Corporation ("Armistead") violated the Civil Rights Act of 1866, 42 U.S.C. Sections 1981 and 1982, and Section 25 of article 49B of the Annotated Code of Maryland by discriminating against plaintiff Karen Pinchback on account of her race in connection with the transfer of a leasehold of a single family housing unit in the cooperative housing complex known as Armistead Gardens.[1] The Court awarded plaintiff Karen Pinchback

1 On May 3, 1987, the Court entered a Consent Decree as to plaintiff's claims against defendants Roy E. Jones, Roy E. Jones Real Estate, Inc., and J.R. Diamond, Inc. (Paper 100).

compensatory damages and her attorney fees and costs, but withheld entry of final judgment until determination of the appropriate affirmative relief. After the Court of Appeals dismissed defendant Armistead's erroneous appeal, this Court held a hearing on plaintiff's Amended Motion for Affirmative Relief (Paper 133) on March 22, 1989.

Based on the findings of fact and conclusions of law described in its June 23, 1988 Opinion, this Court concluded that affirmative relief was necessary and proper to prevent and discourage further acts of discrimination by defendant Armistead. In accordance with the Court's written Opinion, 689 F. Supp. 541 (D. Md. 1988), and its oral Opinion and rulings rendered at the conclusion of the hearing on affirmative relief, IT IS, this 8th day of May, 1989, by the United States District Court for the District of Maryland,

ORDERED:

(1) That judgment BE, and the same hereby IS, ENTERED in favor of plaintiff Karen Pinchback against defendant Armistead Homes Corporation in the sum of Two Thousand Five Hundred Dollars with attorneys' fees and costs;

(2) That affirmative relief BE, and the same hereby IS, ORDERED as follows:

SECTION I

DEFINITIONS

1. As used in this Order, the term "Armistead" means defendant Armistead Homes Corporation and its successors and assigns, including any and all persons and entities over whom Armistead has control, and its agents, officers, employees, and committees. These persons and entities include, but are not limited to the Board of Directors and the Membership Committee of the Armistead Homes Corporation, and the manager of Armistead Gardens.

2. As used in this Order, the term "Dwelling" means any housing unit or group of such units contained in the housing complex now known as Armistead Gardens or for which the lease or sale shall require the approval of the Armistead Homes Corporation during the term of this Order.

3. As used in this Order, the term "Dwelling leasehold" means a lease granted by Armistead conferring the right to occupy a Dwelling.

4. As used in this Order, the term "prospective buyer" means any person who has made inquiries about, or expressed an interest in, purchasing a Dwelling leasehold, whether from Armistead or from an owner of a Dwelling leasehold.

5. As used in this Order, the term "prospective renter" means any person who has made inquiries about, or expressed an interest in, renting a Dwelling, whether

from Armistead or from an owner of a Dwelling leasehold.

6. As used in this Order, the term "applicant" means any person who has applied for membership in Armistead.

SECTION II

GENERAL NONDISCRIMINATION OBLIGATIONS

1. Armistead shall make available Dwellings to all persons and shall consider all applicants on an equal basis without regard to race, color, religion, sex, or national origin.

2. Armistead shall not violate any of the provisions of the Fair Housing Act of 1968, as amended, 42 U.S.C. Sections 3601 et seq., the Civil Rights Act of 1966, 42 U.S.C. Sections 1981 and 1982, or Article 49B of the Code of Maryland.

3. Armistead, in any communication with prospective buyers, prospective renters, applicants, and the general public, shall communicate on an equal and uniform basis, without regard to race,

color, religion, sex, or national origin concerning the availability of and the requirements for renting a dwelling or purchasing a dwelling leasehold, including membership in Armistead. In particular, Armistead shall not represent to any person that a Dwelling is not available for inspection or rental or that a Dwelling leasehold is not available for sale, when such Dwelling or Dwelling leasehold is in fact available.

4. Armistead shall not prohibit, discourage or otherwise attempt to prevent the reasonable use of signs, notices, letters, advertisements or other similar activities used to inform the public about the sale or rental of homes or leaseholds in Armistead Gardens, or the availability of financing for such units.

5. Armistead shall not provide information regarding the racial composition of Armistead Gardens or the

race of any residents, leaseholders, or renters of any Dwellings to any prospective buyers, prospective renters or applicants or to the public in general.

6. Armistead shall not enter into any agreement or contract which to its knowledge will require it to undertake obligations inconsistent with the terms of this Order.

7. Armistead, including in particular its Board of Directors and Membership Committee, shall not, on the ground of race, color, religion, sex, or national origin, refuse to accept or recommend the refusal to accept, any applicant.

8. Armistead shall not exercise any option to purchase a Dwelling leasehold on the ground of the race, color, religion, sex, or national origin of its owner, a prospective buyer, a prospective renter, or applicant.

9. Armistead, including in particular its Board of Directors and Membership Committee, shall make a good faith effort to encourage and support employees and those associated with Armistead, including members, past members and residents of Armistead Gardens, to carry out the terms of this Order. Armistead shall not coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right protected by the terms of this Order or by the Fair Housing Act.

10. This Order's terms shall be liberally construed in accordance with the equal housing opportunity goals and purposes of 42 U.S.C. Sections 1981-82, 42 U.S.C. Section 3612, and Section 25 of Article 49B of the Code of Maryland.

SECTION III

EMPLOYEE TRAINING

1. Armistead shall notify, in writing, all current and future employees, members of its Board of Directors, and members of the Membership Committee, of Armistead's nondiscrimination policy, which notification shall include the Statement of Policy set forth in Exhibit A and a copy of this Order. Such notification shall be given to current employees, Board members, and Committee members no later than thirty days after the effective date of this Order, and to future employees, Board members, and Committee members, within thirty days after they are hired or assume their duties. Armistead shall require such persons to execute written acknowledgements that they fully understand their responsibilities under the policy and this Order and that

failure to comply with the terms of the policy is cause for dismissal or other appropriate disciplinary action. Such acknowledgements shall remain on file in the office of Armistead.

2. Armistead shall establish, within sixty (60) days of the date of this Order, a fair housing training program to be conducted, at Armistead's option, either by a person or organization designated by the plaintiff and approved by the Court or by Armistead. If Armistead chooses to allow plaintiff to designate a person or organization to conduct the program, plaintiff will not be allowed to attend the program. However, if Armistead chooses to conduct the program itself, Armistead will give notice to plaintiff or her representative of the date or dates of the training program and plaintiff or her representative will be allowed to attend. The training program shall consist of an

oral presentation and a written manual. The oral presentation and written manual shall be provided to all current personnel who have contact with prospective leaseholders or tenants or who are responsible for determining the acceptability of applicants. Each such employee shall be required to sign a statement setting forth the date or dates on which the employee attended the program. Similarly situated future personnel shall be provided with the written manual, and shall sign a statement indicating that they have read and understood the manual. All statements signed by current and future personnel shall remain on file with Armistead. The program shall include: instruction on the requirements, spirit and purpose of all applicable fair housing laws; a review of internal practices designed to prevent discrimination; and a review of

Armistead's policy of nondiscrimination (see Exhibit A). Any reasonable honorarium for this training, subject to a ceiling of $500, will be paid by Armistead.

3. Within ninety (90) days of the effective date of this Order, Armistead shall inform counsel for the plaintiff that it has complied with the provisions of paragraph 1, and that it has established the training program described in paragraph 2 of this Section. Within an additional 30 day period, Armistead also shall send to plaintiff's counsel copies of the executed written acknowledgements described in paragraph 1 of this Section and executed Statements for employees described in paragraph 2 of this Section.

SECTION IV

ADVERTISING

1. Armistead shall prominently display in its office a fair housing

poster in a form approved by the Secretary of Housing and Urban Development (see 24 C.F.R. Part 110) in a location easily visible to all visiting members of the public.

2. Armistead shall include in legible type on all business cards, stationery, lease forms and all literature which is distributed to the public, an "equal housing opportunity" logotype (a copy of which is attached hereto as Exhibit B) in the form and size specified in the Department of Housing and Urban Development's advertising regulations, 24 C.F.R. Part 109, except that no logo shall be smaller than 1/2" x 1/2" and that the words "Equal Housing Opportunity" can be substituted on business cards instead of the logo. Where Armistead contracts with independent contractors to solicit or locate prospective buyers or renters, Armistead will require those independent

contractors to comply with this provision with respect to their business cards or literature as a condition of their association with Armistead.

3. Commencing immediately, all advertisements published by or on behalf of Armistead shall include an Equal Housing Opportunity logo, statement, or slogan, as published at 24 C.F.R. 109.30(a). All advertisements four column inches or larger shall either

(a) display the Equal Housing Opportunity logo, which includes the "Equal Housing Opportunity" slogan, as pictured in Exhibit B attached hereto; or

(b) include the following statement

"We are pledged to the letter and spirit of U.S. policy for the achievement of equal housing opportunity throughout the Nation. We encourage and support an affirmative advertising and marketing program in which there are no barriers to obtaining housing because of race, color, religion, sex, or national origin."

All logos shall meet the following minimum size requirements:

i. half-page ad or larger--logo 2" x 2";

ii. one-eighth page to half-page ad--logo 1" x 1"

iii. four column inches to one-eighth page--logo 1/2" x 1/2".

The above size requirements apply to standard size newspaper pages. The size of logos may be reduced proportionately for smaller pages, except that no logo may be smaller than 1/2" x 1/2". All logos (or the policy statement, if used in lieu of the logo) shall be printed in display face roughly equivalent to other print found in the advertisement.

Advertisements less than four column inches need not include a logo or statement, but must include the "Equal Housing Opportunity" slogan.

4. In all future display advertisements and promotional materials published by or on behalf of Armistead that depict human models, black models

shall constitute at least 33% of the human models in the ad.

5. Armistead shall send to up to thirty (30) real estate brokers or agents in the Baltimore area, to be designated by plaintiff, a letter advising that it provides equal housing opportunity and welcomes inquiries from potential buyers without regard to the race, color, religion, sex, or national origin of the leasehold buyer, leasehold seller, sublessor, subleasee, cooperating broker, or agent. In addition, Armistead shall send a similar letter to the following community organizations: the NAACP, the Baltimore Chapter of the NAACP, Baltimore Neighborhoods, Inc., the Baltimore Urban League, the Belair-Edison Housing Service, Coldstream-Homestead Montebello Adopt-A-House, COIL-CEDC, Neighborhood Housing Services of Govans, Neighborhood Housing Services of Irvington, Northwest Baltimore Corporation, Park Heights

Community Corporation, Sandtown-Winchester Housing Program, Middle East Housing Center, and the St. Ambrose Housing Aid Center. Addresses for these organizations are attached hereto as Exhibit D.

6. When Armistead or any of its officers, directors or office personnel are advised that a Dwelling has been or may be offered for sale, or that a Dwelling has been or may be offered for rental, Armistead shall send to the owner of the leasehold, and to any real estate agent or broker retained by the owner to sell or rent the leasehold, a letter referring to the prospective leasehold transfer or rental and containing the Statement of Policy set forth in Exhibit A. The letter shall recommend that any advertising for the leasehold comply with the requirement set forth in paragraph 3 of this Section. The letter also shall state that the Dwelling will be placed on

a list of houses offered for sale or rent, to be posted in the offices of Armistead, and shall remain posted prominently until the Dwelling is taken off the market. Each such listing shall include the address of the Dwelling, and the name and telephone number of the owner or his real estate agent or broker. All prospective buyers and prospective renters who come to the Armistead office shall be shown the list.

7. When Armistead receives an inquiry from a real estate broker or agent concerning the sale of Dwelling leaseholds or the rental of Dwellings, or concerning any particular Dwelling, Armistead shall within three business days send a letter to that broker or agent containing the Statement of Policy set forth in Exhibit A, provided, however, that Armistead need not send more than one such letter to any

individual broker or agent in any twelve (12) month period.

SECTION V

RECORDKEEPING

1. When Armistead or any of its officers, directors, or office personnel are advised that the leasehold of a Dwelling has been offered for sale, or that a Dwelling has been offered for rental, Armistead shall record and maintain records containing the following information:

a. The name of the present owner;

b. The address;

c. Whether the Dwelling leasehold is being offered for sale or whether the Dwelling is being offered for rental;

d. The date on which Armistead learned that the Dwelling leasehold was to be offered for sale or that the Dwelling was to be offered for rental;

e. The name of the realtor handling the transaction, if any;

f. The name, address, phone number, and date of inquiry for each person who has come to Armistead's office

to inquire about the Dwelling who provided such information on a "Housing Inquiry Form" as described below, including the reason or reasons for rejection if the application is denied or disapproved)see Exhibit C);

g. The name, address, and race of applicant for membership in the Corporation wishing to purchase the Dwelling leasehold or to rent the Dwelling, and the disposition of that application; and

h. The name, address, and race of the ultimate buyer of the Dwelling leasehold or renter of the Dwelling with the sale price and date of sale or sublease.

2. The following procedure will be followed with respect to a person who comes to Armistead's office to inquire about the availability of Dwelling leaseholds for sale or of Dwellings for rent:

Such person shall be asked to fill out a "Housing Inquiry Form" substantially identical to the form attached hereto as Exhibit C.

3. The following procedure will be followed when anyone calls by telephone to find out whether there are any available Dwellings:

a. All persons inquiring by telephone will be told whether there is any Dwelling known to be on the market. Each such person will be invited to come to the office to examine the list of available Dwellings.

b. All persons who respond to such an invitation and come to the office or other designated place will be treated in accordance with the provisions of paragraph 2 of this Section.

4. At the time that any application is denied or disapproved, Armistead shall record the reason or reasons for such denial or disapproval, and shall provide this information to plaintiff pursuant to paragraph 5 below. Plaintiff or her representative shall not divulge information concerning any rejected applicant to that applicant or to anyone else without Court approval. Aggregate statistical information without the names of applicants may be compiled and disclosed without Court approval.

5. Armistead shall send to the plaintiff or her representative reports

containing all the information collected pursuant to paragraphs 1, 2 and 4 of this Section. Such reports will be submitted on a semi-annual basis and will be submitted within thirty days after the end of each six-month period, beginning with the first day of the first month following the date of this Order. The information described in paragraph 1 of this Section will be reported separately for each Dwelling on the market during the reporting period. A separate report will be made containing all the information collected under paragraph 2 of this Section. Submissions of copies of all the housing inquiry forms (see Exhibit C), together with a table showing the number of inquiries made during the reporting period, broken down by race, will be sufficient to comply with this requirement to report information collected under paragraph 2 of this Section. The keeping of records by

Armistead reflecting race for purposes of complying with this Order shall not be considered discriminatory or in any way unlawful.

SECTION VI

SCREENING CRITERIA

1. Within thirty days of the date of this Order, Armistead shall formalize, in writing, the screening criteria for approving applications for membership, which shall be uniformly applied to all applicants, regardless of race, color, national origin, religion, or sex. Armistead shall forward a copy of this statement promptly to plaintiff or her representative within 45 days of the date of this Order, and will make a copy available to any applicants upon request.

2. Armistead shall not deny a minority applicant the opportunity to purchase an apartment because of unsubstantiated views on that person's finances. For example, unless Armistead

can point to a sound basis for believing that an applicant's income source will negatively affect his or her ability to buy and maintain a Dwelling, its views on that prospective purchaser's income origin shall not be a reason for disapproving the sale.

3. Armistead is not restricted from determining its screening criteria except as set forth in the preceding paragraphs and may revise its criteria at any time. Armistead shall notify plaintiff of any revisions and provide a copy of the revised criteria within 15 days of each modification.

4. Once formalized, the screening criteria statement shall be prominently and visibly posted in all offices maintained by Armistead in which prospective applicants are likely to inquire about the availability of Dwellings.

SECTION VII

COMMUNITY RELATIONS PROGRAM

1. In order to provide for the transition of Armistead Gardens to a racially integrated neighborhood and to ease the tensions that may occur in accomplishing this goal, Armistead shall take affirmative steps to increase its contact and cooperation with local community and neighborhood groups which include black residents or constituents. Armistead shall report to plaintiff or her representative every six (6) months for the first two (2) years after the date of this Order on how this is being accomplished.

2. Armistead shall, in accordance with its by-laws and the provisions of its leasehold documents, take those steps within its power to protect the quiet enjoyment of black persons moving into or living within Armistead Homes Corporation. In appropriate cases,

Armistead shall notify and request assistance from the Community Relations Department of the Baltimore Police Department.

SECTION VIII

ARMISTEAD'S RIGHT OF FIRST REFUSAL

Armistead shall exercise any option that Armistead may have to purchase a leaseholder's dwelling upon matching the price a prospective buyer is willing to pay without regard to the race, color, religion, sex or national origin of a prospective buyer.

SECTION IX

TERM OF ORDER AND COMPLIANCE REPORT

Except for Section II, this Order shall continue for five (5) years after the date on which it is signed by the Court. The obligations of Armistead contained in Section II of this Order are not so limited. Within ninety (90) days after approval of this Order, Armistead shall file a compliance report with the

Court which enumerates the preliminary steps they have taken to implement the provisions of the Order. Such report shall be served on plaintiff's counsel.

SECTION X

REVIEW PROCEDURES

1. This Court will retain jurisdiction of this action for the duration of this Order. If plaintiff or her representative believe that Armistead is not complying with its obligations under this Order, either may notify Armistead in writing, stating the provisions(s) concerned and the details of the alleged noncompliance. Armistead shall, within thirty days of any such notice, notify the plaintiff or her representative in writing of the results of its investigations and of any steps taken in response to any problems of alleged noncompliance.

2. From time to time, tests may be conducted of Armistead for the purpose of

evaluating its compliance with this Order or the fair housing laws.

3. If any employee of or individual associated with Armistead, including members, past members, leaseholders or renters, believes that Armistead is not complying with its obligations under this order, he or she may report a complaint to this Court or to plaintiff who may proceed with the procedures outlined in paragraphs 1 and 4 of this Section X.

4. In the event of a continued disagreement among the parties as to the complaint, the plaintiff may take appropriate action with the Court, setting forth the inability of the parties to resolve the dispute. If a hearing is required, the prevailing party may apply to the Court for reasonable attorneys' fees.

5. Plaintiff shall designate a representative to receive and review the reports required by this Order and

otherwise to monitor Armistead's compliance with the terms of this Order. At six-month intervals, the representative shall provide to Armistead an accounting of its costs in connection with monitoring compliance with this Order. Such costs, subject to a ceiling of $600 for each six-month period, shall be paid by Armistead.

(3) That Melvin Maeser having been dismissed as a party defendant by Court order dated October 29, 1987 (Paper 112), that judgment BE, and the same hereby IS, ENTERED in favor of defendant Melvin Maeser against plaintiff Karen Pinchback as to plaintiff's second amended complaint;

(4) That an Order of Default having been entered against third party defendant Roy E. Jones Real Estate, Inc. on July 6, 1988 (Paper 117), that judgment BE, and the same hereby IS, ENTERED in favor of the third party

plaintiff Armistead Homes Corporation against third party defendant Roy E. Jones Real Estate, Inc. in the sum of Two Thousand Five Hundred Dollars with attorneys' fees and costs;

(5) That defendant Diane Dailey having filed a Petition in accordance with Chapter 13 of the Bankruptcy Code on July 28, 1988, in the United States Bankruptcy Court for the District of Maryland, and proceedings in this case having been automatically stayed pursuant to 11 U.S.C. Section 362 of the Bankruptcy Code, that the case against defendant Diane Dailey BE, and the same hereby IS, CLOSED ADMINISTRATIVELY pending the disposition of the Bankruptcy proceedings, and counsel for plaintiff is directed to advise this Court promptly of the disposition of the Bankruptcy proceedings in order that this Court may proceed with the above Civil proceedings, if necessary;

(6) That pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Court finds that there is no just reason for delay and, accordingly, the Court enters final judgment at this time; and

(7) That the Clerk shall mail a copy of this Order forthwith to counsel of record.

Walter E. Black, Jr.
United States District Judge

Exhibit A

ARMISTEAD HOMES CORPORATION
STATEMENT OF POLICY AND PROCEDURES

Armistead Homes Corporation adheres to the policy and practice of equal housing opportunity by not engaging in or otherwise facilitating discrimination on the basis of race, color, national origin, religion, or sex. In order for Armistead Homes Corporation to play its part in eliminating all traces of discrimination in housing, we hereby pledge to handle all inquiries, applications for membership in the Corporation and all other business with respect to the transfer of leaseholds and rental of housing on a nondiscriminatory basis.

Consistent with that policy and mindful that the anti-discrimination laws of the United States and the State of Maryland are quite specific in the area of housing and in conformance therewith,

Armistead Homes Corporation forbids each of its members and employees, at all times and in every part of their work with Armistead, from engaging in the following actions:

1. Refusing to show, sell, rent, negotiate for the sale or rental of, or otherwise making unavailable or denying, a dwelling to any person because of race, color, religion, sex or national origin;

2. Discriminating against any person in the terms, conditions or privileges of a sale or rental or in the provision of services or facilities in connection therewith because of race, color, religion, sex or national origin;

3. Making any verbal or written statement with respect to the sale or rental of a dwelling that indicates any preference, limitation or discrimination based on race, color, religion, sex or national origin, or any statement

indicating an intention to make any such preference, limitation or discrimination;

4. Representing to any person because of race, color, religion, sex or national origin that any dwelling is not available for inspection, sale or rental when such dwelling is in fact so available;

5. Entering into an agreement which imposes any restriction on the race, color, religion, sex or national origin of persons to whom a dwelling may be shown, sold or rented.

It is important for all members, employees and associates of the Corporation to understand that any action taken, even in part, because of race, color, religion, sex or national origin, that has the effect of limiting housing opportunities to such persons protected under these laws constitutes a violation of the laws of both Maryland and the United States.

Armistead Homes Corporation firmly believes that providing equal opportunity to all persons will benefit our community and we are firmly committed to making fair housing work for us.

Exhibit B

Exhibit C

ARMISTEAD HOMES CORPORATION

HOUSING INQUIRY FORM*

Homeseeker's Name _____ Race** _____

Address _____ Telephone _____

HOUSING PREFERENCE INFORMATION

Price Range _____

Geographic Area or Location _____

HOMES SHOWN OR RECOMMENDED

	Address	Listing Price	Date Shown or Recommended
1.	_____	_____	_____
2.	_____	_____	_____
3.	_____	_____	_____
4.	_____	_____	_____
5.	_____	_____	_____

DISPOSITION _____

_____

_____

_____ _____

SIGNATURE (Armistead representative) DATE

*This form is adapted from a form used by the National Association of Realtors in connection with the National Association of Realtors Affirmative Marketing Agreement, which was accepted by the Department of Housing and Urban Development on December 16, 1975.

**Information pertaining to homeseeker's race is requested in connection with the Order of the United States District Court in the case of Pinchback v. Armistead Homes Corporation, Civ. Action No. B-81-1334.

Exhibit D

Director of Consumer
Service & Housing
Baltimore Urban League
1150 Mondawmin Concourse
Baltimore, MD 21215

Belair-Edison
Housing Service
3401 Mannasota Avenue
Baltimore, MD 21231
Phone: 485-8422

Coldstream-Homestead
Montebello Adopt-A-House
1527 Gorsuch Avenue
Baltimore, MD 21218
Phone: 235-6721

COIL-CEDC
11 S. Carrollton Avenue
Baltimore, MD 21223
Phone: 752-8500

NAACP
Baltimore Chapter
6 West 26th Street
Baltimore, MD 21218

Neighborhood Housing
Services of Govans
4305-07 York Road
Baltimore, MD 21212
Phone: 323-7730

Neighborhood Housing Services
of Irvington
4107 Frederick Avenue
Baltimore, MD 21229
Phone: 644-1904

Northwest Baltimore
Corporation
3319 W. Belvedere Avenue
Baltimore, MD 21215
Phone: 542-6610

Park Heights Community
Corporation
3939 Reisterstown Road
Suite 283
Baltimore, MD 21215
Phone: 578-0208

Sandtown-Winchester Housing
Program Community Association
1343 N. Calhoun Street
Baltimore, MD 21217
Phone: 462-1933

Middle East
Housing Center
711 N. Chester Street
Baltimore, MD 21205
Phone: 675-0900

St. Ambrose Housing
Aid Center
321 E. 25th Street
Baltimore, MD 21218
Phone: 235-5770

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2117

KAREN PINCHBACK,

Plaintiff - Appellee,

versus

ARMISTEAD HOMES CORPORATION,

Defendant - Appellant,

and

MELVIN MAESER; ROY E. JONES REAL ESTATE, INC.; ROY E. JONES; DIANE DAILEY; J. R. DIAMOND, INC.,

Defendants,

versus

ROY E. JONES REAL ESTATE, INC.,

Third Party Defendant,

and

UNITED STATES OF AMERICA,

Amicus Curiae.

*****

Appeal from the United States District Court for the District of Maryland, at Baltimore. Walter E. Black, Jr., District Judge. (CA-81-1334-B)

*****

Argued: January 11, 1990

Decided: July 6, 1990

*****

Before PHILLIPS and MURNAGHAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

*****

Affirmed in part and vacated in part by published opinion. Senior Judge Butzner wrote the opinion, in which Judge Phillips and Judge Murnaghan joined.

*****

ARGUED: Bernard Jerome Sevel, BERNARD J. SEVEL, P.A., Baltimore, Maryland, for Appellant. Robert Frederick Leibenluft, HOGAN & HARTSON, Washington, D.C., for Appellee. ON BRIEF: Adam J. Sevel, BERNARD J. SEVEL, P.A., Baltimore, Maryland, for Appellant. John C. Keeney, Jr., David W. Karp, HOGAN & HARTSON, Washington, D.C.; Roderic V. O. Boggs, John P. Relman, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, Washington, D.C., for Appellee. James P. Turner, Acting Assistant Attorney General, Roger Clegg, Deputy Assistant Attorney General, Jessica Dunsay Silver, Thomas E. Chandler, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae.

*****

BUTZNER, Senior Circuit Judge:

In this appeal, we must consider whether the "futile gesture" theory applies to acts of housing discrimination. The district court concluded that it does and held Armistead Homes Corporation liable under 42 U.S.C. Section 1981, Section 1982, and Maryland law for denying Karen Pinchback housing opportunities because she is black. We find it unnecessary to determine liability under Maryland law, but in all other respects we affirm the judgment of the district court. See Pinchback v. Armistead Homes Corp., 689 F. Supp. 541 (D. Md. 1988).

I

This case is before us because of Karen Pinchback's efforts to secure suitable housing in Armistead Gardens, Baltimore, Maryland. Because the facts are discussed in great detail in the

district court's opinion, we include only a brief summary.

Armistead exercised control over the composition of the Armistead Gardens community. Armistead Gardens is a cooperative arrangement made up of "members" who purchase 99 year leases from the corporation. The corporation retains a fee interest in the housing units and grants the members the right to renew their leases. When a member sells a unit, Armistead does little if anything to locate potential buyers. However, Armistead has the right of first refusal of any offer and can simply veto a sale. Armistead also has a membership committee, composed of residents, who screen prospective buyers by seeing them in person and making recommendations to Armistead's board of directors. The board exercises broad supervisory powers and must give its approval before a prospective buyer can become a member of

the Armistead Gardens community. See 689 F. Supp. at 544-45. At the time of trial, Armistead Gardens was over 30 years old and never had a black member, although a few black persons had applied. See 689 F. Supp. at 545. The district court concluded Armistead Gardens was "more than just a neighborhood; it is a cooperative housing development where the members . . . determine who is, and who is not, permitted to become an Armistead leasehold owner." 689 F. Supp. at 545.

Responding to an advertisement in a Baltimore newspaper for a "starter home" costing only $12,000, Pinchback phoned a real estate agent, Diane Dailey, who was employed by Roy E. Jones Real Estate, the firm retained by the seller of the home to find a buyer. Dailey arranged to show Pinchback the home. Pinchback missed the scheduled meeting but called Dailey again to set up another time. When Pinchback called, Dailey asked her whether she was

black, and when Pinchback told her that she was, Dailey informed her that the community in which the home was located did not permit blacks to live there. That community was Armistead Gardens. Pinchback took Dailey at her word and assumed that the description of Armistead's policy was accurate. Dailey showed Pinchback some homes in other neighborhoods, but none interested her.

Pinchback reported the incident to an investigator with the Department of Housing and Urban Development. She then initiated this lawsuit against Armistead, Dailey, Jones Real Estate, and several of its officials, charging violations of her rights under Sections 1981 and 1982, Title VIII, 42 U.S.C. Sections 3601-31, and Maryland's fair housing law. As the case moved towards trial she eventually settled with all of the defendants except Armistead. The Title VIII claim was

dismissed because the statute of limitations had run.

The district court conducted an eight day bench trial on the remaining claims. The court found that Armistead discriminated against blacks and injured Pinchback as a result. Pinchback was awarded $2,500, attorneys fees and costs. The court also ordered detailed injunctive relief designed to cure the racist policies it found at Armistead Gardens.

The district court applied the "futile gesture" or "futile act" theory developed in Title VII employment discrimination law to Pinchback's housing claims. The court found that Armistead had a discriminatory policy and would have rejected Pinchback had she actually applied for a leasehold interest at Armistead Gardens. The court also found that Pinchback would have applied but for the policy and was put off by a

reasonably held belief that filling out and submitting an application was a waste of time. The court concluded that Armistead's discrimination injured Pinchback despite the absence of actual application and rejection. 689 F. Supp. at 554.

This conclusion turns on a number of specific factual findings. Armistead was found to have a policy of discriminating against blacks, which we discuss more fully in section II below. The court found that when Pinchback responded to the ad she was a potential bona fide purchaser who was financially able to buy the property and sincerely interested in it. 689 F. Supp. at 549-50. Importantly, the court considered whether Pinchback's reliance on Dailey's description of the policy reasonably deterred her from applying. Although Dailey represented the leasehold seller and had no official connection to

Armistead, the court found that Pinchback "reasonably regarded" Dailey as a "reliable information source, thereby justifying Pinchback's decision to forego applying to Armistead Gardens." 689 F. Supp. at 554. The court also found Armistead to be the source, "directly or indirectly," of Dailey's information about the racist policy at Armistead Gardens. 689 F. Supp. at 554.

II

Armistead first contends that Pinchback failed to prove Armistead discriminated against blacks. There was, in the words of the district court, "little evidence establishing that Armistead actually refused to approve the leasehold application of a black person." 689 F. Supp. at 545. Armistead suggests that evidence of this sort is necessary to prove that blacks receive discriminatory treatment, as it is hard

otherwise to tell if blacks are considered by different criteria than white applicants. Armistead also argues that what other evidence there was of racism at Armistead proved only prejudice on the part of individual residents and officials, not a community policy of discrimination.

The record belies this argument. Two former members of Armistead's governing board, Diana Lynn Ward and Margie Conant, gave a detailed account of the board's hostility towards blacks. Their testimony reveals a singular anxiety on the part of the board over the prospect of blacks coming into the community. Ward and Conant each spoke of instances in which the board considered strategies at its regular meetings to keep blacks out. The discussions were usually deleted from the recordings made by Armistead of the meetings. The attitudes expressed went beyond mere personal

prejudice, depicting the policy of Armistead itself. On several occasions, for instance, one board president intimated to residents that any attempt to sell property to blacks would be rejected by Armistead through the board's screening process and veto power. Ward also recounted that a board member declined to tell one prospective black applicant of financing help available through Armistead in order to discourage an application. There was testimony as well indicating that the board discussed how to target a white audience when advertising to the community. The board's attitude is best summarized by a former board president who said of this litigation, "if we don't beat this case, we'll have every nigger in Baltimore coming here." 689 F. Supp. at 546.

It seems quite clear that the district court correctly found a racially discriminatory policy at Armistead. The

discrimination worked primarily to deter black interest in the community from ever forming. The effectiveness is apparent. The district court chose to credit the testimony of the two insiders, Ward and Conant, observing that "the Armistead board as a collective group was hostile to blacks." 689 F. Supp. at 547-48. Their testimony was corroborated to an extent by a HUD investigator, who testified that the Armistead office manager informed him that although blacks had applied for membership at Armistead Gardens, none had been accepted. 689 F. Supp. at 545. The court characterized in part Armistead's rebuttal testimony as "blatantly incredible" and granted it little weight. 689 F. Supp. at 547. Armistead's challenge to the factual finding fails accordingly.

III

Armistead also assigns error to the district court's adoption of the "futile gesture" doctrine as the basis of liability under Sections 1981 and 1982. Although the doctrine is an accepted part of federal fair employment law, Armistead opposes its application to the housing claims in this case. It believes the extension is unwarranted.

The doctrine was first recognized in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), where the Supreme Court affirmed a finding that a common carrier and a union had violated Title VII by discriminatory hiring and promotion policies. While many of the company's employees had applied for promotions and been discriminatorily rejected, others had not applied because the company's discriminatory practices were well known to them. The company argued that the failure to apply barred

recovery because the nonapplicants did not suffer direct harm from discrimination. Deciding which employees were entitled to relief, the Supreme Court had this to say:

> [T]he company's assertion that a person who has not actually applied for a job can <u>never</u> be awarded seniority relief cannot prevail. . . . A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection. . . . When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.

431 U.S. at 365-66. The Court remanded the case with instructions to determine which nonapplicants would have applied but for the company's practices. 431 U.S. at 368. The Court limited recovery to those employees whose demonstrable

interest in the position was cut short by actual knowledge of unlawful practices.

Subsequent cases in our court and others demonstrate how integral to fair employment law the futile gesture idea has become. See, Holsey v. Armour & Co., 743 F.2d 199, 208-09 (4th Cir. 1984); United States v. Gregory, 871 F.2d 1239, 1242 (4th Cir. 1989); Babrocky v. Jewel Food Co., 773 F.2d 857, 867 (7th Cir. 1985). It is now accepted that the failure to apply for a job does not preclude recovery if a claimant can demonstrate that he would have applied but for accurate knowledge of an employer's discrimination and that he would have been discriminatorily rejected had he actually applied. Of course, this is in addition to the other elements of a given employment claim such as possessing the necessary qualifications for the job.

Armistead insists that the futile gesture doctrine is an inappropriate

basis for liability in this case for a number of reasons. Its first objection is simply to the novelty of using the doctrine for a housing discrimination claim.

Armistead's concern is ill-founded. Fair employment concepts are often imported into fair housing law. The foremost example is the prima facie proof test first established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), for fair employment, which has become a fundamental part of Title VIII and Sections 1981 and 1982 fair housing law. See, e.g., Selden Apartments v. HUD, 785 F.2d 152, 159 (6th Cir. 1986); Asbury v. Broyham, 866 F.2d 1276, 1279 (10th Cir. 1989); Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548, 551 (9th Cir. 1980). Although fair employment and fair housing statutes create and protect distinct rights, their similarities have traditionally facilitated the development

of common or parallel methods of proof when appropriate. Consequently, we do not consider novelty a bar to the application of the doctrine.

Armistead contends that differences between typical housing and employment cases make an extension of the futile gesture doctrine unworkable. Armistead suggests that the doctrine fits the employment setting well because often the typical nonapplicant who sues is an employee or someone connected with the employer in a manner that separates the nonapplicant from the casual man on the street. This in turn usually means that it is the employer or someone closely associated with him who is the source of information about the challenged policy. These attributes tend to guarantee that the employer has an active hand in discouraging the application. By contract, Armistead sees in this case many ills which will lead to voluminous,

frivolous litigation over fair housing. Armistead emphasizes that Pinchback had no direct contact with it, learning of its policy through a real estate agent with no official ties to the corporation.

We do not share Armistead's concern about frivolous litigation in light of the careful treatment the district court has given the futile gesture theory as the basis for recovery. As viewed by the district court, the following elements must be satisfied to establish a violation of fair housing law by reliance on the futile gesture theory: the plaintiff must be a member of a racial minority who was a potential bona fide buyer of the property and financially able to purchase it at the time it was offered for sale; the owner discriminated against people of the plaintiff's race; the plaintiff was reliably informed of this policy of discrimination and would have taken steps to buy the property but

for the discrimination; and the owner would have discriminated against the plaintiff had the plaintiff disclosed an interest in the property. 659 F. Supp. at 545-54. The district court found that Pinchback satisfied these elements of a fair housing claim based on the futile gesture theory. Its findings are amply supported by the record.

Pinchback was not required to do more than she did. She had no need to examine the property after Dailey told her no blacks could live there for precisely the same reasons why she had no need to exercise the futility of submitting an offer. The burden of humiliation occasioned by discrimination is heavy. When one has felt it as Pinchback did here, we cannot require the victim to press on meaninglessly.

To borrow from an illustration in Justice Stewart's Teamsters opinion, if Armistead should announce its policy of

discrimination by a "Whites Only" sign, its "victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs." 431 U.S. at 365. This is the crux of the futile gesture doctrine. The discrimination is no less because Armistead conveyed its message by subtle means. The victims who were reliably informed of Armistead's policy would not be limited to those who approached Armistead and were rebuffed. Pinchback, who was unwilling to engage in the futile gesture of submitting an offer for the property, is nonetheless a victim of discrimination. See 431 U.S. at 366.

IV

Armistead complains that Pinchback failed to meet her initial prima facie burden under McDonnell Douglas and hence cannot prevail under Sections 1981 and 1982. Not surprisingly, Armistead

identifies as the missing elements Pinchback's failure to apply and the lack of an outright rejection from Armistead. It appears that Armistead is simply recasting its opinion to the futile gesture doctrine in terms of a prima facie showing.

The McDonnell Douglas scheme is a recognition that direct proof of unlawful discrimination is often difficult to obtain. It permits a plaintiff to make an initial showing, indirect in nature, that raises a presumption of illegality. This scheme is routinely used in housing and employment discrimination cases alike.

The district court concluded that Pinchback produced sufficient direct evidence of discrimination to prove Armistead violated Sections 1981 and 1982. 689 F. Supp. at 549-50. Because she proved purposeful discrimination directly, largely through the testimony

of former board members Ward and Conant, the McDonnell Douglas method of proof is irrelevant. All of this is explained in United States Postal Service Board v. Aikens, 460 U.S. 711, 713-14 (1983), in which the Court said: "Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a prima facie case. We think that by framing the issues in these terms, they have unnecessarily evaded the ultimate question of discrimination vel non." See also Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1985) ("[T]he McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination.").

V

Armistead also assigns error to the award of $2,500 in compensatory damages.

Before trial, Pinchback agreed to a consent decree with defendants Roy E. Jones Real Estate, Roy E. Jones and J.R. Diamond, and accepted $4,000 in exchange for a release of all her claims against those parties. The consent decree specifically reserved Pinchback's rights regarding Armistead for "any present or future claims."

Armistead argues that Md. Code Ann. Art. 50 Section 19 governs the $2,500 award. Under Section 19, if a tortfeasor makes a settlement payment, subsequent awards against unreleased joint tortfeasors must be reduced by the settlement amount. If Section 19 controls the settlement issue, the $4,000 paid pursuant to the consent decree ought to count toward the $2,500 judgment against Armistead. This would reduce what Armistead owes to zero.

This might be true if the $2,500 had been awarded for Armistead's violation of

Maryland law. The district court specifically found otherwise, holding that "[t]his reduction [for settlement awards established by Section 19] has no effect here, since it is inapplicable to the damages awarded on the federal claims." 689 F. Supp. at 555. The district court decided that the violations of Sections 1981 and 1982 were adequate by themselves to justify the $2,500 award.

The effect of the release on Pinchback's federal claims against Armistead is a question of federal law. See Gamewell Mfg. Inc. v. HVAC Supply, Inc., 715 F.2d 112, 114 n.4 (4th Cir. 1983). We believe the earlier settlement agreement neither reduces the judgment amount nor releases Armistead from its obligation to pay. First, there is no federal equivalent to Section 19 which suggests that the $2,500 should be reduced. Second, under federal law the

settlement agreement only releases Armistead if Pinchback intended it to have that effect. See Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 343-48 (1971); Avery v. United States, 829 F.2d 817, 819 (9th Cir. 1987). The agreement clearly does not release Armistead and, in fact, contains an express reservation of all Pinchback's rights against the corporation. Accordingly, Armistead owes her the full amount of the judgment.

VI

The district court also held that Armistead violated Md. Code Ann. Art. 49B, Section 25. 689 F. Supp. at 554-55. This aspect of the case involves the issue whether Maryland fair housing law confers a private right of action on the victims of discrimination. Because the Maryland Court of Appeals has not yet had an occasion to decide this question, we

decline to address it. The award of damages to Pinchback and the grant of equitable relief rest firmly on federal law, so a decision on her state law claim is unnecessary at this stage of the litigation. Accordingly, with the exception of the court's ruling on the state law claim, the judgment is affirmed. The judgment finding liability under state law is vacated. Pinchback shall recover her costs.

AFFIRMED IN PART;
VACATED IN PART.

No. 90-573

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ARMISTEAD HOMES CORPORATION,
Petitioner,

v.

KAREN PINCHBACK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where the trial court and Court of Appeals both found that an all-white housing cooperative with available units had an established policy against accepting black residents, that a bona fide would-be black purchaser was reliably informed of that discriminatory policy by a qualified real estate agent, that but for that policy the black purchaser would have applied for housing at the cooperative, and that had she applied she would have been rejected on racial grounds, must she nevertheless have suffered the humiliation of making a formal application to the cooperative in order to bring an action for unlawful discrimination under 42 U.S.C. §§ 1981 and 1982?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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BRIEF IN OPPOSITION

Respondent Karen Pinchback respectfully requests that this Court deny the petition for writ of certiorari seeking review of the judgment of the Court of Appeals for the Fourth Circuit. The Court of Appeals upheld the liability of an all-white 1,518-unit Baltimore housing cooperative for racial segregation of a blatant and shocking type not seen in this Court since the early 1960's. In its effort to justify review by this Court, petitioner Armistead Homes Corporation (hereinafter "Armistead") misstates critical factual findings of the trial court, concurred in by the Court of Appeals, and ignores the contrary position of the United States Department

of Justice Civil Rights Division as amicus curiae below.[1] Armistead furthermore contends that the judgment below conflicts with principles of this Court, conflicts with decisions of other lower courts, represents a departure from settled principles of discrimination law, and threatens to open a floodgate for new discrimination actions. None of this is so. In fact, this case involves nothing more than the routine application of well-settled principles of discrimination law to an extraordinary and despicable instance of racial animus.

COUNTERSTATEMENT OF THE CASE

At the time this claim arose, Armistead was a whites-only community of 1,518 individual leasehold properties surrounded by black communities in Baltimore, Maryland. Armistead had never had a black member in its thirty year history. App. 14-15, 111. The Court of Appeals found Armistead's pervasive racial hostility best summarized in the comments of a former board president who remarked of this litigation, "if we don't beat this case, we'll have every nigger in Baltimore coming here." App. 117.[2] The District Court found as a fact that the foreseeable and intended consequence of Armistead's discriminatory policies was to deny respondent Karen Pinchback ("Pinchback") the opportunity to purchase a leasehold at Armistead because she is black, in violation

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[1] The Brief for the United States as Amicus Curiae is set forth in the Appendix to this brief. The United States noted in its amicus curiae brief below that in utilizing its authority to seek relief for victims of housing discrimination under Section 814 of the Fair Housing Act, 42 U.S.C. § 3614, the Department of Justice would consider an individual to be an aggrieved person if he sought housing but did not formally apply based on a reasonable belief that submitting an application would be futile in view of the discriminatory policy. App. 2a.

[2] The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 907 F.2d 1447 (4th Cir. 1990).

of the anti-discrimination provisions of 42 U.S.C. §§ 1981 and 1982 and Md. Ann. Code art. 49B. As the Court of Appeals recognized, the District Court's holding "turns on a number of specific factual findings." App. 114. For this reason, and because Armistead's statement of the case ignores significant aspects of the record below, it is necessary to consider the District Court's factual findings in greater detail.

Findings of Fact by the Trial Court

The District Court found that Armistead exercised an extraordinary level of control over leasehold transfers and the racial composition of its membership. Through its membership committee and board of directors, Armistead controls "who is, and who is not, permitted to become an Armistead leasehold owner." App. 15, 111. The membership committee visits with prospective purchasers to ensure that they are "people who will fit into the community." The board retains the absolute right to determine at its discretion whether or not a prospective purchaser will be approved for membership. App. 11-15.

During an eight-day bench trial, two former members of Armistead's governing board provided a detailed account of the board's hostility to blacks. The District Court expressly credited as true, among other evidence, the following remarkable testimony:

(1) Every Armistead board on which one witness had served (including Armistead boards between 1983-1987) "has discussed how to keep blacks out of Armistead." App. 17;

(2) At board meetings in 1975 and 1976, board members discussed their concern that posting of signs by realtors in Armistead yards would lead to blacks trying to purchase leaseholds in Armistead and therefore should be discouraged. App. 17-18;

(3) On one occasion, a board member explained that a black individual inquiring about available hous-

ing in Armistead was not told about potential financing assistance because, in the board member's words, "we don't need any niggers." App. 18-19;

(4) When one individual purchased her leasehold in 1981 (the year following Pinchback's inquiry into housing at Armistead), the individual was told at the closing by either Dailey (the listing agent for the leasehold in which Pinchback was interested) or a board member not to worry because there were "no niggers in Armistead." App. 17;

(5) One board member stated in a board meeting—in connection with this case—words to the effect that "we don't want any blacks in Armistead." Another board member voiced the same concern in a board meeting, although not in reference to this case. App. 22;

(6) On one occasion, when a member sought permission to use Armistead's recreation hall for a function which would be attended by blacks, an Armistead board member stated "that it would be over his 'dead body' that 'niggers' would be allowed to use the hall." App. 18-19;

(7) Several leasehold owners threatened the president of Armistead's board that they would sell their property to blacks, to which he responded that "they would have to go through the membership review and credit check first, clearly implying that they would not successfully do so." App. 19;

(8) "Fred James, while President of the Corporation, and Lillie May Evans, while a Board member, stated that blacks had to be kept out of Armistead." App. 22-23; and

(9) In 1984 or 1985—after Armistead had again been forcefully reminded of its fair housing obligations (through this litigation brought by Pinchback)—the then-president of the Armistead

> board stated in reference to Pinchback's suit that "if we don't beat this case, we'll have every nigger in Baltimore coming here." App. 19.

The District Court concluded on the basis of this testimony that the Armistead board had a long-standing policy of discriminating against blacks at the time Pinchback was interested in purchasing the property. App. 27, 65.

The District Court found that Pinchback first expressed an interest in securing housing at Armistead in February 1980, when she contacted a real estate agent in response to a classified advertisement for an Armistead home. In her conversation with the agent, Pinchback discussed the location, price and financing terms for the purchase and made an appointment to visit the property. App. 3-5. The District Court found that Pinchback had sufficient financial resources to complete the purchase and to make the monthly payments. App. 36-37. Before she was able to see the property, however, she had a subsequent conversation with the agent who asked whether she was black and then "bluntly informed [her] that the color of her skin precluded her from pursuing a leasehold interest at Armistead." App. 6, 64.

Armistead argues that the listing agent did not have sufficient contact with Armistead to be "reliably apprised" of Armistead's racist policy. Petition at 15. This ignores the District Court's specific factual findings that Armistead carried out its racist policy "fully aware" that local realtors visited Armistead and interacted with members, including board members; that Armistead "either directly or indirectly caused Dailey to become aware" of the racist policy,[3] with consequences which were inten-

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[3] In view of this factual finding by the District Court, Armistead's assertion "that the statements attributed to Diane Dailey by the Plaintiff had no connection with any information conveyed by Armistead to her," Petition at 9, patently misstates the trial court's finding on this issue.

tional and "quite foreseeable"; and that Dailey accurately conveyed the policy to Pinchback, a bona fide prospective leasehold buyer who reasonably regarded Dailey as a reliable information source. App. 56-61.[4]

The District Court found that Pinchback reasonably relied on the information conveyed by the listing agent and did not pursue any further her interest in purchasing at Armistead, although she did report the incident to an investigator with the Department of Housing and Urban Development, and she subsequently initiated this lawsuit. App. 6, 112. The District Court found as a fact that Pinchback would have applied to live at Armistead but for its policy of racial exclusion and that she would have been discriminated against had she applied. App. 27.

Applying these detailed factual findings to settled principles of causation embodied in the futile gesture doctrine established by this Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) ("*Teamsters*"), the District Court held Armistead liable under 42 U.S.C. §§ 1981 and 1982. The District Court also found a separate basis for liability under the "Discrimination in Housing" sections of article 49B of the Maryland Annotated Code, the state analogue to the Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619 (1982). App. 58. In addition, the District Court found Armistead liable under the same three statutes, 42 U.S.C. §§ 1981 and 1982 and Md. Ann. Code art. 49B, § 25, on a legal ground entirely independent of the *Teamsters* futile ges-

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[4] As the United States noted below, the fact that the information source (the listing agent in this case) is a third party has no relevance. "It is the discrimination itself, and not plaintiff's knowledge of it, that must come from defendant." Nor does the manner in which the third party received his information have independent significance "once the nonapplicant establishes that she reasonably regarded the information source as reliable, thereby justifying her decision to forego applying." App. 15a & n.18.

ture doctrine—namely, that Armistead's illegal discriminatory actions were the proximate cause of the injuries suffered by Pinchback. App. 58-61.

Armistead's Appeal

Armistead appealed the District Court's judgment. On appeal, the Civil Rights Division of the United States Department of Justice, noting its major enforcement responsibilities under the Fair Housing Act,[5] submitted a brief as amicus curiae arguing that the policies underlying the application of the futile gesture doctrine apply equally to claims of nonapplicants in housing discrimination cases. Otherwise, the most entrenched forms of discrimination would go unremedied. App. 9a-11a.

On appeal, Armstead disputed the sufficiency of the evidence of discrimination. The Court of Appeals reviewed the District Court's factual findings and discerned in the detailed trial testimony of the two former board members what it euphemistically termed "a singular anxiety on the part of the board over the prospect of blacks coming into the community."[6] It was "quite clear," the Court of Appeals concluded, "that the district court correctly found a racially discriminatory policy at Armistead [which] worked primarily to deter black interest in the community from ever forming. Its effectiveness is apparent." App. 117-18.

Turning to the District Court's application of the *Teamsters* causation principles, the Court of Appeals observed that those principles have become "integral to

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[5] The Fair Housing Act is codified as Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. §§ 3601-3619.

[6] The Court of Appeals found that this "anxiety" manifested itself in discussions by the board on strategies to keep blacks out, suggestions that the board would use its screening process and veto power to reject any attempted sales to blacks, concealment of financing availability, and discussions on how to target a white audience when advertising to the community. App. 116-17.

fair employment law" and that "[f]air employment concepts are often imported into fair housing law." App. 121-22. The Court of Appeals quoted extensively from this Court's reasoning in *Teamsters*:

> A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection. . . . When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.

App. 120, quoting *Teamsters*, 431 U.S. at 365-66.

The Court of Appeals found ample support in the record for the District Court's finding that Pinchback met the stringent factual requirements of a *Teamsters* claim by showing that she was a member of a racial minority who was a potential bona fide purchaser of the property with sufficient financial resources to complete the purchase; that Armistead had a policy of discrimination against people of Pinchback's race; that Pinchback was reliably informed of this policy and would have taken steps to complete the purchase but for the discrimination; and that Armistead would have discriminated against Pinchback had Pinchback submitted a formal application. App. 124-25. Accordingly, the Court of Appeals affirmed the District Court's careful fact-specific application of causation principles from *Teamsters*:

> Pinchback was not required to do more than she did. She had no need to examine the property after Dailey told her no blacks could live there for precisely the same reasons why she had no need to exercise the futility of submitting an offer. The burden of humiliation occasioned by discrimination is heavy. When one has felt it as Pinchback did here,

> we cannot require the victim to press on meaninglessly.

App. 125.[7]

REASONS THE PETITION SHOULD BE DENIED

I. The Decisions Below Reflect No More Than A Routine And Highly Fact-Specific Application Of Settled Legal Principles To Shockingly Blatant Racist Conduct.

The decisions below are completely consistent with settled principles of discrimination law adopted by this Court in *Teamsters*. The District Court methodically applied the stringent *Teamsters* requirements to its specific factual findings, including the findings concerning Armistead's pervasive hostility to blacks and its patently racist policy of segregation. Armistead does not dispute these findings,[8] and it advances no serious explanation for its contention that this Court's reasoning in *Teamsters*, as embodied in the futile gesture doctrine which is universally accepted and routinely applied to racial discrimination in the employment context, should not apply to the startling overt racial discrimination at issue

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[7] Because the Court of Appeals found the District Court's judgment to rest firmly on federal law, it concluded that a decision on Pinchback's state law claim was unnecessary "at this stage of the litigation." Accordingly, it vacated the District Court's finding of liability under state law. App. 132.

[8] Indeed, Armistead could not dispute the factual findings of the lower courts in this forum because this Court does not sit to review facts determined by two courts below. *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.14 (6th ed. 1986).

here.[9] Because *Teamsters* clearly applies in the factual circumstances of this case and was correctly applied below, no review by this Court is warranted.

As both lower courts and the United States Department of Justice recognized, the common objectives of employment and housing discrimination law compel the application of the futile gesture doctrine to the circumstances of this case. As a general matter, federal courts have given Title VII principles "wide acceptance" in housing discrimination cases. App. 54, 122-23. Indeed, as the Fourth Circuit acknowledged, the similarities between fair empoyment and fair housing statutes "have traditionally facilitated the development of common or parallel methods of proof." App. 122-23. The Department of Justice Civil Rights Division echoed this view in its amicus brief below, noting that the policy objectives and prudential concerns embodied in the employment discrimination statutes apply in the housing discrimination context as well. App. 10a-12a & n.13.

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[9] Armistead is incorrect in asserting that the application of the *Teamsters* test here would be inconsistent with previous holdings of this Court. Petition at 17-20. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), was decided twelve years before the futile gesture doctrine was recognized by this Court in *Teamsters*. Moreover, *Moose Lodge* involved a plaintiff who, unlike Karen Pinchback in this case, never evinced any interest in becoming a member and thus had no standing to litigate the constitutional issue respecting Moose Lodge's membership requirements. 407 U.S. at 166. Armistead's reliance on *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), is likewise misplaced. *Burdine* was a Title VII case by an *applicant*; no futile gesture doctrine issue was involved. Instead, the Court applied the method of proof established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) ("*McDonnell Douglas*") and cautioned that this "standard is not inflexible" and "not necessarily applicable in every respect in differing factual situations." 450 U.S. 253-544 & n.6, quoting *McDonnell Douglas*, 411 U.S. at 802 n.13. As the Fourth Circuit noted below, "the *McDonnell Douglas* method of proof is irrelevant" in this case because Pinchback provided ample direct evidence of discrimination. App. 127-28.

Armistead itself concedes as much in seeking to apply here the method of proof established in *McDonnell Douglas*, an employment discrimination case. Petition at 10-11.[10]

Moreover, the policies underlying this Court's *Teamsters* analysis are fully applicable to claims of nonapplicants in housing discrimination cases where, as in *Teamsters*, the defendant's pervasive discrimination has been proved. As this Court observed in *Teamsters*:

> The denial of [civil rights claims] relief on the ground that the claimant had not formally applied . . . could exclude from the Act's coverage the victims of the most entrenched forms of discrimination. Victims of gross and pervasive discrimination could be denied relief precisely because the unlawful practices had been so successful as totally to deter . . . applications from members of minority groups.

431 U.S. at 367.

The District Court properly recognized that there is "no basis in principle" for distinguishing between the prospective employee who is dissuaded from applying for a job because of the discriminatory practices of an employer, and the prospective resident who is dissuaded from applying for housing because of the discriminatory practices of the seller. App. 53-54. As the United States correctly concluded in its amicus brief below, "[t]he prospective applicant for housing facing certain rejection on the basis of race is in a position directly analogous to that of the prospective employee. There is simply no meaningful way to distinguish the two situations." App. 11a. Karen Pinchback was not required to suffer the additional "humiliation of explicit and certain rejection." *Teamsters*, 431 U.S. at 365. App. 47, 125.

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[10] As the District Court noted, the futile gesture doctrine has been incorporated into the *McDonnell Douglas* analysis by at least one Court. App. 54-55 & n.10, citing *Rodgers v. Peninsular Steel Co.*, 542 F. Supp. 1215, 1218-19 (N.D. Ohio 1982).

In making this fact-specific determination, the District Court applied a rigorous standard of proof based on the *Teamsters* causation requirements. Under the *Teamsters* analysis, a nonapplicant must demonstrate that he was a potential victim of unlawful discrimination by meeting "the not always easy burden of proving that he . . . would have applied but for the discrimination and that he would have been discriminatorily rejected had he applied." 431 U.S. at 367-68 & n.52. Application of this standard necessarily turns on the particular factual circumstances of each specific case. Here, the District Court found that Pinchback satisfied these elements. App. 9-58. The Court of Appeals found ample support in the record for the District Court's conclusion. App. 125.

II. There Is No Conflict Among The Circuits.

The federal courts routinely have applied Title VII principles to housing discrimination cases, as both lower courts recognized. App. 54, 122-23. Certainly, there is no conflict among the circuits on this point.[11] Nor has any conflict developed over the application of the *Teamsters* causation requirements to circumstances such as those presented here. In fact, courts routinely have applied the *Teamsters* futile gesture doctrine in analogous employment discrimination cases to permit claims by nonapplicants who were able to demonstrate that they were deterred from applying because of discrimination and

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[11] *See, e.g., Selden Apartments v. HUD*, 785 F.2d 152, 159 (6th Cir. 1986) (*McDonnell Douglas* test applies under Title VIII, Section 1981, or Section 1982); *Asbury v. Brougham*, 866 F.2d 1276, 1279 (10th Cir. 1989); *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 551 (9th Cir. 1980). *See also Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982) ("anti-discrimination objectives of Title VII"); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978) ("The Supreme Court has noted the need to construe both Title VII and Title VIII broadly so as to end discrimination.").

that had they applied, they would have been discriminatorily rejected. App. 49-51, 151.[12] Thus, Armistead's suggestion of a conflict among the federal appellate courts is incorrect.[13]

III. The Fact-Specific Decisions Below Have No Widespread Applicability.

Contrary to Armistead's contention, this is not a case of widespread applicability. Fortunately, the unusual circumstances of this case do not arise frequently in the housing context. Armistead itself acknowledges that in the thirteen years since this Court's decision in *Teamsters*, only the court below has had occasion to apply

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[12] *See, e.g., United States v. Gregory*, 871 F.2d 1239, 1242 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 720 (1990); *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 867 (7th Cir. 1985); *Holsey v. Armour & Co.*, 743 F.2d 199, 208-09 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985); *White v. Carolina Paperboard Corp.*, 564 F.2d 1073, 1086 (4th Cir. 1977); *McDermott v. Lehman*, 594 F. Supp. 1315, 1323 (D. Me. 1984). As the Court of Appeals observed, the doctrine has become "integral to fair employment law."

[13] Armistead relies on two lower court cases, both readily distinguishable. Petition at 19-20. *Jackson v. Dukakis*, 526 F.2d 64 (1st Cir. 1975), was a pre-*Teamsters* case in which the plaintiff was denied standing "for want of any causal connection between his alleged injuries and the defendants' actions." 526 F.2d at 668 & n.3. The District Court's factual findings in this case, unanimously concurred in by the Fourth Circuit, clearly establish Pinchback's satisfaction of this requirement, as she was denied a housing opportunity and she suffered humiliation and emotional distress directly attributable to Armistead's blatantly racist policies. App. 56-58, 113-18. Armistead also cites *Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531 (9th Cir. 1982). The court in *Gay* found that the plaintiff had not established the "necessary prerequisite" to a futile gesture doctrine claim: "a consistently enforced discriminatory policy" which discourages applicants from even attempting to apply. 694 F.2d at 546, quoting *Teamsters*, 431 U.S. at 365. Unlike the plaintiff in *Gay*, Pinchback presented ample proof of a pervasive and effective policy of racial discrimination which "worked primarily to deter black interest in the community from ever forming." App. 117-18.

the futile gesture doctrine to housing discrimination. Petition at 14-15.[14]

Armistead also asserts that the District Court's decision will invite claims by plaintiffs who are "not in a definable group" and who hear of the discriminatory policy "by rumor or newspaper article which the . . . plaintiff considers authoritative." Petition at 15-16. However, these arguments completely ignore the stringent evidentiary requirements imposed by the District Court, which entirely defuse Armistead's exaggerated concerns. The plaintiff must be a member of a racial minority against which defendant discriminated, he must be a bona fide prospective purchaser, and he must be reliably informed of the policy of discrimination. App. 124-125.[15] These factual findings required by the District Court clearly establish that Pinchback had taken every step she reasonably could have been expected to take to purchase the Armistead leasehold until she was accurately informed by the agent that further steps would be futile. Accordingly, the District Court's holding for Pinchback does not open the floodgates for future litigation.

IV. The Legal Rule Proposed By Petitioner Would Not Affect The Outcome Of This Case.

Even if this Court were to adopt the legal rule urged by Armistead in this case—that a seller may pursue a blatant policy of racial exclusion provided he is successful at deterring prospective applicants from submitting a formal (and futile) application—that rule would not change the result in this case. The District Court correctly found Armistead liable under the anti-discrimina-

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[14] Thus, even if one were to speculate that federal courts might misapply the standard of proof set forth by the court below in the manner suggested by Armistead, it is at best premature to address that hypothetical concern in the context of this case.

[15] In addition, the plaintiff must carry the heavy burden of proving, as did Pinchback below, that had he submitted a formal application, he would have been rejected because of his race.

tion provisions contained in article 49B of the Maryland Annotated Code. The District Court also imposed liability under all three statutes, 42 U.S.C. §§ 1981 and 1982 and Md. Ann. Code art. 49B, § 25, using normal rules of proximate causation entirely independent of the *Teamsters* futile gesture doctrine. App. 58-61. Noting that "courts routinely borrow from common law tort principles in fleshing out the civil rights statutes," App. 59 (citing *Curtis v. Loether*, 415 U.S. 189, 195-96 (1974)), the Court expressed "no doubt" in concluding that Pinchback's injury was a foreseeable and intended consequence of Armistead's policy of racial exclusion. App. 58-61. Under the particular facts of this case, either of these two independent bases would support a judgment favoring Pinchback.

The Court will grant certiorari "only when there are special and important reasons therefor." Sup. Ct. R. 10.1. The District Court's fact-specific application of the stringent *Teamsters* standard of proof to the uniquely shocking and pernicious racism of Armistead, unanimously affirmed by the Court of Appeals, clearly does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2117

KAREN PINCHBACK,
Plaintiff-Appellee
v.

ARMISTEAD HOMES CORPORATION,
Defendant-Appellant

Appeal from the United States District Court
for the District of Maryland

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States has major responsibility for the enforcement of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. 3601 *et seq.* The Secretary of Housing and Urban Development and the Attorney General are charged with responsibility for administering and enforcing the Act. See 42 U.S.C. 3608, 3614. Although this housing discrimination case is brought under 42 U.S.C. 1981 and 1982, and not under the Fair Housing Act, the same elements must be established in a housing discrimination action where intentional discrimination is alleged, whether brought un-

der the Act or under Sections 1981 and 1982. See, *e.g.*, *Selden Apartments* v. *HUD*, 785 F.2d 152, 159 (6th Cir. 1986) (collecting cases).[1] In light of this overlap, the decision in this case will likely affect the government's enforcement responsibilities. Indeed, in utilizing its authority to seek relief for victims of housing discrimination under Section 814 of the Act, 42 U.S.C. 3614, the Department of Justice would consider an individual to be an aggrieved person if he sought housing but did not formally apply because he reasonably believed it would be futile in view of a discriminatory policy.

QUESTION PRESENTED

Whether an individual who seeks housing but does not formally apply because he reasonably believes it would be futile is a victim of the discrimination that discouraged his application, and thus has a cause of action under 42 U.S.C. 1981 and 1982.

STATEMENT OF THE CASE

1. In February 1980, plaintiff, a black woman, read a classified advertisement in a Baltimore newspaper for the sale of a house. She called the number listed in the advertisement, which was for a real estate agency, and left a message. The following day an agent, Diane Dailey, returned plaintiff's call, and they arranged to meet so

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[1] The contstruction given the scope of Section 1981 in *Patterson* v. *McLean Credit Union*, 109 S. Ct. 2363 (1989), is inapposite to this case. First, as to plaintiff's Section 1981 claim, the issue here is clearly the "formation" of a "contract." Further, the Court made clear in *Patterson* that, with respect to *how* a Section 1981 claim is proved, Title VII disparate treatment law provides the appropriate "scheme of proof." *Id.* at 2377-2378. Thus, *Patterson* provides support for the Court's established practice of interpreting Section 1981 and 1982 similarly to Title VIII. Finally, plaintiff here also makes a Section 1982 claim, and the "contract" language does not appear at all in this statute.

that plaintiff could see the house (689 F. Supp. at 542-543; App. 310-311).[2]

Plaintiff missed the appointment and called the agent to make a new arrangement to see the house. During this conversation the agent asked plaintiff whether she was black. When plaintiff responded that she was, the agent told her that it was the policy of the housing development, Armistead Gardens, not to allow blacks to live in the community (689 F. Supp. at 543; App. 312).[3] As a result, plaintiff did not further pursue purchasing the house (*Ibid.*).

On May 27, 1981, plaintiff filed suit against the cooperative and others, alleging that they discriminated against her on the basis of race in the sale of housing by depriving her of a residence in Armistead Gardens.[4] Plaintiff alleged causes of action under the Fair Housing Act (42 U.S.C. 3604), 42 U.S.C. 1981 and 1982, and Maryland state law. The Fair Housing Act claim, however, was dismissed based on the statute of limitations (689 F. Supp. at 542 n.2; App. 310 n.2; see also App. 49). After a bench trial, the court found that the cooperative discriminated against the plaintiff on the basis of race in the sale of housing, and was liable under Sec-

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[2] Since we address only the legal issue whether a nonapplicant may have a cause of action for housing discrimination under 42 U.S.C. 1981 and 1982, we will simply summarize the underlying facts as found by the district court. *Pinchback* v. *Armistead Homes Corp.*, 689 F. Supp. 541 (D. Md. 1988). The opinion is contained in the parties' Joint Appendix ("App."), pages 309-350.

[3] Armistead Gardens is a cooperative housing development. Residents are "members" of the cooperative and own a leasehold interest in their property. The cooperative owns the real estate. The cooperative does not directly assist members in the sale of their leasehold interests, but a prospective buyer may become a member only with the approval of the cooperative's Board of Directors (689 F. Supp. at 544-545; App. 314-317).

[4] When the case proceeded to trial, the cooperative was the only active defendant (see 689 F. Supp. at 542; App. 309-310).

tions 1981 and 1982 as well as state law (689 F. Supp. at 554; App. 344).

2. The court recognized that plaintiff never applied for housing at the cooperative. Based on testimony given at trial, however, the court found that the cooperative had a policy of discrimination against blacks and that, had plaintiff applied to live at the cooperative, she would have been denied membership because she is black.[5] The court thus found that the cooperative was liable under the "futile gesture" or "futile act" theory enunciated in *Teamsters* v. *United States*, 431 U.S. 324 (1977), a Title VII case (689 F. Supp. at 553-554; App. 341-344).[6] As the court noted, this theory "has been employed by numerous courts in employment discrimination cases to grant nonapplicants applicant status where the nonapplicant can demonstrate that he was deterred from applying because of discrimination and that had he applied, he would have been discriminatorily rejected" (689 F. Supp. at 552; App. 339).

Although the court recognized that it was a question of first impression whether the *Teamsters* theory is ap-

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[5] The court based this conclusion largely on the testimony of two Armistead members who had also served on the Board of Directors (689 F. Supp. at 545-548; App. 317-326). The court noted, for example, that one former board member testified that every board she had been on discussed how to keep blacks out of the development (689 F. Supp. at 545; App. 318-319). The court noted that another board member testified that at a number of board meetings members stated their opinions about keeping blacks from becoming leasehold owners (689 F. Supp. at 546; App. 321). Finally, the court noted that there had never been a black member of the cooperative, even though the development bordered several black neighborhoods (689 F. Supp. at 545; App. 317).

[6] The court also found the cooperative liable under a "proximate cause" theory, which analogized plaintiff's claim of intentional discrimination to a claim of an intentional tort (689 F. Supp. at 554-555; App. 344-346). We do not address whether defendant was properly found liable under this theory.

plicable to housing discrimination cases, the Court concluded that it could see "no basis in principle for distinguishing between the prospective employee who claims he was dissuaded from applying for a job because of the discriminatory practices of an employer, and the prospective resident who claims he was dissuaded from applying for housing because of the discriminatory practices of the seller of the housing" (689 F. Supp. at 553 (footnote omitted); App. 341-342). The court also noted the wide acceptance of other Title VII principles of proof in housing discrimination cases, particularly the adoption of the *McDonnell Douglas* test for establishing a prima facie case (689 F. Supp. at 553; App. 342).

In applying the futile act theory, the court reiterated the two-part test set forth in *Teamsters* that a nonapplicant must meet to establish that he was a potential victim of discrimination: (1) "that he would have applied but for the discrimination," and (2) "that he would have been discriminatorily rejected had he applied" (689 F. Supp. at 552 (quoting *Teamsters* v. *United States*, 431 U.S. at 368 n.52); App. 338-339). Having concluded that had plaintiff applied she would have been discriminatorily rejected, the court addressed the first part of the test. The court found that plaintiff "was a bona fide buyer at the time she inquired about the leasehold interest for sale at Armistead" (689 F. Supp. at 549-550; App. 331). The court then stated that the crucial inquiry was whether plaintiff was justified in foregoing applying to the cooperative (689 F. Supp. at 554; App. 343-344).

The court recognized that plaintiff did not hear about the cooperative's "no-black policy" from the cooperative, but learned about it solely from the real estate agent (689 F. Supp. at 554; App. 343).[7] The court thus stated

[7] The court further found that the real estate agent was neither an actual nor apparent agent of the cooperative (689 F. Supp. at 550-551; App. 332-335).

that "[t]he critical question is whether [the real estate agent] was reasonably regarded by Pinchback as a reliable information source, thereby justifying Pinchback's decision to forego applying to Armistead Gardens" (689 F. Supp. at 554; App. 343-344). The court concluded that since the real estate agent was the listing agent for the property and, from plaintiff's perspective, the "sole person to contact regarding the advertised property, * * * [she] was someone whom Pinchback could naturally be expected to rely on for information regarding a discriminatory housing policy at Armistead" (689 F. Supp. at 554; App. 344). The court thus found that plaintiff had met her burden of establishing that she would have applied but for the discrimination.

SUMMARY OF THE ARGUMENT

In most actions alleging intentional discrimination, a member of a protected class has applied for a position or opportunity and been rejected, allegedly on the basis of the protected status. In some instances, however, a prospective applicant may be deterred from formally applying after learning that it would be futile because of a discriminatory policy. In these instances, the issue arises whether the nonapplicant has been the victim of the discrimination that discouraged her application.

In employment discrimination cases since the Supreme Court's decision in *Teamsters* v. *United States*, 431 U.S. 324 (1977), courts have consistently held that under the futile act theory a nonapplicant does indeed have a cause of action for intentional discrimination. In the instant case, the district court correctly concluded that the futile act theory is applicable in housing discrimination cases. Other courts in housing discrimination cases have, of course, borrowed related principles from Title VII cases, including the *McDonnell Douglas* test for a prima facie case of discrimination. Here, the prospective applicant for housing facing certain rejection on a discriminatory basis is in a position directly analogous to that of the

prospective employee. Thus, if the prospective housing applicant reasonably believes that her application would be futile, she is a victim of the discrimination that deterred her application.

The district court also properly articulated the elements of proof under the futile act theory. As in the employment cases, to establish that she was a potential victim of discrimination the nonapplicant must prove that she would have applied but for the discrimination, and that had she applied she would have been discriminatorily rejected. Under the first part of this test, the crucial inquiry is whether the nonapplicant was justified in believing that her application would have been futile. Where, as here, the plaintiff received her information concerning the defendant's discriminatory practices from a third party, the plaintiff must establish that the third party could reasonably be regarded as reliable. Under the second part of the test, the court must examine the evidence to determine whether the defendant discriminated against blacks.

ARGUMENT

AN INDIVIDUAL WHO SEEKS HOUSING BUT DOES NOT FORMALLY APPLY BECAUSE SHE REASONABLY BELIEVES IT WOULD BE FUTILE IS A VICTIM OF THE DISCRIMINATION THAT DICOURAGED HER APPLICATION, AND THUS HAS A CAUSE OF ACTION FOR HOUSING DISCRIMINTION

A. *The District Court Correctly Concluded That the Futile Act Theory Applies to Housing Discrimination Cases*

1. The futile act theory derives from the Supreme Court's decision in *Teamsters* v. *United States*, 431 U.S. 324 (1977), a Title VII case. In that case, the United States brought suit against a trucking company and a union alleging, in part, that the company discriminated

against blacks and other minorities by refusing to recruit, hire, transfer, or promote them on an equal basis with whites, particularly with respect to the more desirable "line-driving" positions. After affirming the findings that the company engaged in systematic and purposeful employment discrimination, the Supreme Court addressed the proper remedial scheme, including the propriety of relief for those class members who did not apply for line-driver positions. The Court held that "an incumbent employee's failure to apply for a job is not an inexorable bar to an award of retroactive seniority." *Id.* at 364.

The Court began its analysis by noting that "a primary objective of Title VII is prophylactic: to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees." *Ibid.* The Court then stated:

> The effects of and the injuries suffered from discriminatory employment practices are not always confined to those who were expressly denied a requested employment opportunity. A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection.
>
> * * * When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.

Id. at 365-366.

The Court in *Teamsters* went on to discuss the elements of the nonapplicant's burden of proof. The Court stated, "A nonapplicant must show that he was a potential victim of unlawful discrimination. Because he is necessarily claiming that he was deterred from applying

for the job by the employer's discriminatory practices, his is the not always easy burden of proving that he would have applied for the job had it not been for those practices." *Id.* at 367-368. The Court elaborated that the nonapplicant had to meet a two-part test: (1) "that he would have applied but for the discrimination," and (2) "that he would have been discriminatorily rejected had he applied." *Id.* at 368 n.52. The Court noted that when this test is met "the nonapplicant is in a position analogous to that of an applicant." *Id.* at 368.[8]

2. Although *Teamsters* addressed the claims of nonapplicants in a remedial context, the theory that nonapplicants may, in appropriate circumstances, stand on equal footing with applicants has been widely applied to determine liability. There is, of course, no logical reason whatsoever to draw a distinction between the remedial and liability inquiries in this regard. Thus, in *United States* v. *Gregory*, 871 F.2d 1239, 1242 (4th Cir. 1989), this Court applied the theory to sustain an action. Paraphrasing *Teamsters*, the Court stated that "when an employer's discriminatory policy is known, subjecting oneself to the humiliation of explicit and certain rejection is not required to make out a case of discrimination." *Ibid.*[9] See also *Lams* v. *General Waterworks Corp.*, 766 F.2d 386, 393 (8th Cir. 1985) (court cites *Teamsters* in finding employer liable even though plaintiffs did not apply for promotions).

Similarly, courts have expressly recognized that the *McDonnell Douglas* test for establishing a prima facie case of employment discrimination need not be strictly

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[8] In *Teamsters*, the Court remanded the issue of the nonapplicants' claims for a determination of whether each individual could meet the required burden of proof. 431 U.S. at 371.

[9] This Court has also applied *Teamsters* in a remedial context. *White* v. *Carolina Paperboard Corp.*, 564 F.2d 1073, 1086 (4th Cir. 1977).

applied, and that a nonapplicant can meet his initial burden by meeting the requirements set forth in *Teamsters*.[10] For example, in *Babrocky* v. *Jewel Food Co.*, 773 F.2d 857, 867 (7th Cir. 1985), the court stated that the lower court erred "by applying the *McDonnell Douglas* framework too literally when it rejected * * * plaintiffs' claims because they had never formally applied for meatcutter positions." See also *Rodgers* v. *Peninsular Steel Co.*, 542 F. Supp. 1215, 1218 (N.D. Ohio 1982) (although plaintiff did not apply for the position, "this does not necessarily doom plaintiff's claim. The Supreme Court has established an alternative prima facie case for non-applicants.").[11]

3. The policies underlying application of the futile act theory in Title VII cases apply equally to claims of nonapplicants in housing discrimination cases. As the Supreme Court noted in *Teamsters*, the futile act theory is based on the recognition that the effects of discriminatory employment practices "are not always confined to those who were expressly denied a requested employment opportunity." 431 U.S. at 365. Since the prospect of discrimination can deter job applicants, where a non-

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[10] The *McDonnell Douglas* test—generally used where there is an absence of direct evidence in order to determine whether an inference can be drawn that an employment decision was based on reasons prohibited by Title VII, see *Teamsters* v. *United States*, 431 U.S. at 358 & n.44—requires the plaintiff to produce evidence that (1) he is a member of a protected class; (2) he applied for and was qualified for the opening; (3) he was rejected; and (4) after he was rejected, the position remained open and the employer continued to seek applicants. *McDonnell Douglas* v. *Green*, 411 U.S. 792, 802 (1973). The Court in *McDonnell Douglas* emphasized that the elements of the prima facie case may vary depending on the facts of the particular case. *Id.* at 802 n.13.

[11] Further, although *Teamsters* was a pattern or practice case, the theory has been widely applied in cases by individual litigants. See, *e.g.*, *Babrocky* v. *Jewel Food Co.*, *supra*; *Lams* v. *General Waterworks Corp.*, 766 F.2d 386, *supra*; *Burkey* v. *Marshall County Bd. of Educ.*, 513 F. Supp. 1084, 1097 (N.D.W. Va. 1981).

applicant has demonstrated that in view of the defendant's discrimination it would have been futile to apply, there is no reason to treat the nonapplicant differently from the rejected applicant. Both are victims of discrimination,[12] and recognition of the nonapplicant's claim serves the board prophylactic purposes of Title VII. See *Teamsters*, 431 U.S. at 364.

Moreover, recognition of a nonapplicant's claim avoids the possibility that the most entrenched forms of discrimination will go unremedied. As the Court in *Teamsters* stated:

> The denial of Title VII relief on the ground that the claimant had not formally applied for the job could exclude from the Act's coverage the victims of the most entrenched forms of discrimination. Victims of gross and pervasive discrimination could be denied relief precisely because the unlawful practices had been so successful as totally to deter job applications from members of minority groups. A *per se* prohibition of relief to nonapplicants could thus put beyond the reach of equity the most invidious effects of employment discrimination—those that extend to the very hope of self-realization.

Id. at 367.

The same policy objectives are present in the housing context as well. The prospective applicant for housing facing certain rejection on the basis of race is in a position directly analogous to that of the prospective employee. There is simply no meaningful way to distinguish the two situations. Thus, in housing, as in em-

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[12] See also *Berkman* v. *City of New York*, 705 F.2d 584, 594 (2d Cir. 1983) ("Those who have been deterred by a discriminatory practice from applying for employment are as much victims of discrimination as are actual applicants whom the practice has caused to be rejected.").

ployment, the nonapplicant who as a result of discriminatory practices is deterred from applying for housing is a victim of discrimination no less than the applicant. Moreover, as the district court noted (689 F. Supp. at 553; App. 342), courts in housing discrimination cases have widely adopted the *McDonnell Douglas* test as the starting point for determining whether the plaintiff has established a prima facie case of housing discrimination. Further, courts have done so regardless of whether the housing discrimination action was based on the Fair Housing Act, Section 1981, or Section 1982. See, *e.g.*, *Selden Apartments* v. *HUD*, 785 F.2d 152, 159 (6th Cir. 1986) (same prima facie test applies under Title VIII, Section 1981, or Section 1982); *Asbury* v. *Brougham*, 866 F.2d 1276, 1279 (10th Cir. 1989) (*McDonnell Douglas* test applies to claims under both Fair Housing Act and Section 1982); *Phiffer* v. *Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 551 (9th Cir. 1980) (*McDonnell Douglas* test applies to action under Section 1982). These cases indicate the propriety of specifically applying Title VII principles to determine the elements of a prima facie case of intentional housing discrimination and, of course, the futile act theory relates to the prima facie case.[13]

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[13] Courts have widely recognized that "the anti-discrimination objectives of Title VIII are parallel to the goals of Title VII." *Smith* v. *Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982). Thus, the Fair Housing Act, like Title VII, is to be interpreted broadly. See, *e.g.*, *Resident Advisory Bd.* v. *Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978) ("The Supreme Court has noted the need to construe both Title VII and Title VIII broadly so as to end discrimination."). In particular, the Supreme Court has broadly construed standing requirements under Title VIII to extend to the full limits of Article III. See, *e.g.*, *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 109 (1979); *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 372-375 (1982) (black individual had standing to sue in her capacity as a "tester"). Recognition of the nonapplicant's claim, in appropriate circumstances, plainly furthers a broad remedial purpose.

4. Defendant's argument (Br. 27-39)[14] that the futile act theory is inapplicable to the instant case is based almost entirely on distinguishing the underlying facts in *Teamsters* from those in this case. Defendant emphasizes, for example, that *Teamsters* was a class action addressing the scope of relief, and involved a different statute and incumbent employees (Br. 29-30). Defendant does not, however, explain why any of these differences matter,[15] or address the subsequent cases that have applied the theory in actions by individuals and to establish liability, situations analogous to that in the instant case.[16] These cases plainly refute defendant's

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[14] "Br. ——" refers to the page number in appellant's opening brief.

[15] Defendant's chief contention is that *Teamsters* is inapposite because of the nature of the plaintiffs—in *Teamsters* they were employees "who had an established relationship with defendant" (Br. 32), whereas in the instant case plaintiff had no relationship with the cooperative. This distinction is irrelevant, however, to whether, as a general matter, the principles that support a nonapplicant's claim of employment discrimination also apply to a nonapplicant's claim of housing discrimination. The relationship between the plaintiff and the defendant simply concerns whether, as a factual matter, plaintiff can meet the *Teamsters* test. See pages 5-6, *supra*. Moreover, the futile act theory enunciated in *Teamsters* would surely apply where, for example, the defendant put up a sign saying "Blacks Need Not Apply."

[16] The only case that defendant cites other than *Teamsters* is *Gay* v. *Waiters' and Dairy Lunchmen's Union*, 694 F.2d 531 (9th Cir. 1982). To support its assertion that the principle in *Teamsters* "has only very limited application to situations essentially peculiar to that which existed in *Teamsters*," defendant states (Br. 36) that the court in *Gay* did not apply the futile act theory in determining that plaintiffs, who did not formally apply for the positions sought, did not establish a prima facie case of employment discrimination. Defendant, however, wholly misstates *Gay*. The court in *Gay* in fact concluded that plaintiffs did not establish the "necessary prerequisite" for reliance on the futile act theory, *i.e.*, that the employer had a "consistently enforced discriminatory policy which discourages applicants from even attempting to apply." *Id.* at 546 (internal quotation omitted, citing *Teamsters*). Thus, the

crabbed reading of *Teamsters*.[17]

B. *The District Court Properly Articulated the Elements of Proof Under the Futile Act Theory*

The Supreme Court in *Teamsters* set forth a two-part test the nonapplicant must meet to establish that she was a victim of discrimination: that she would have applied but for the discrimination, and that had she applied she would have been discriminatorily rejected. 431 U.S. at 368 n.52. In the instant case, the district court properly articulated the elements of proof necessary to meet this test, where, as here, the potential applicant learned of the discrimination from an unaffiliated third party.

1. With respect to the first part of this test, the court must determine whether the usual requirement of application is inappropriate because the plaintiff would have applied but for the discrimination that made such application futile. As an initial matter, the court must determine whether the plaintiff was genuinely interested in the position or opportunity. If she was, the crucial inquiry, as the district court recognized, is whether the nonapplicant was justified in believing that application would

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court in *Gay* did not find that the futile act theory was, as a general matter, inapplicable to plaintiffs' claim; the court, indeed, applied *Teamsters*, and concluded that plaintiffs' proof was insufficient to invoke the theory. The decision in *Gay*, therefore, in no way limits the reach of *Teamsters*.

[17] We note that defendant makes a related argument that plaintiff lacked standing to bring her claims under Sections 1981 and 1982 (Br. 14-22). Defendant chiefly contends that plaintiff did not suffer an injury in fact traceable to its conduct. We agree with the reasoning of the district court that implicit in a finding of liability under the futile act theory is the conclusion that plaintiff was injured and, therefore, has standing to sue (689 F. Supp. at 548 n.7; App. 328 n.7). See, *e.g.*, *Pime* v. *Loyola University of Chicago*, 803 F.2d 351, 353 (7th Cir. 1986) ("Even though appellant did not formally apply for a tenure track position no standing question arises. One does not have to apply for a job when it is obvious that it would be a futile act" (citing *Teamsters*).).

have been futile (689 F. Supp. at 554; App. 343-344). If the potential applicant does not have a reasonable basis for believing that the existence of discrimination makes applying a futility, there is an insufficient link between plaintiff's decision not to apply and the discrimination to render plaintiff a victim of the discrimination.

As the district court also correctly recognized, in determining whether the plaintiff was justified in believing that her application would be futile, the court must examine whether plaintiff could reasonably regard her source as reliable (689 F. Supp. at 554; App. 343-344). This inquiry may be relatively simple where the nonapplicant has learned directly from the employer that her application would be futile. Where, however, as here, the source is a third party, the court properly recognized that the relevant inquiry is whether the third party (here, the real estate agent) was someone the plaintiff "could naturally be expected to rely on for information regarding [defendant's] discriminatory housing policy" (689 F. Supp. at 554; App. 344).[18]

2. In applying the second part of the *Teamsters* test—determining whether the plaintiff would have been discriminatorily rejected had she applied—the district court properly examined the evidence to determine whether the defendant discriminated against a protected class.[19]

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[18] The information source may be, of course, a third party. It is the discrimination itself, and not plaintiff's knowledge of it, that must come from the defendant. Again, the first part of the *Teamsters* test simply focuses on whether plaintiff had a good reason for not applying. Further, as the district court suggested, the plaintiff need not establish how the third party received his information (689 F. Supp. at 554; App. 343). That question has no independent significance once the nonapplicant establishes that she reasonably regarded the information source as reliable, thereby justifying her decision to forego applying.

[19] The instant case rests on defendant's alleged policy of discrimination against blacks, proof of which is central to the second part of the *Teamsters* test. See page 5, *supra*. Plaintiff need not

In the instant case, plaintiff was clearly within the protected class.

CONCLUSION

For the reasons set forth above, this Court should hold that the futile act theory, as enunciated in *Teamsters* v. *United States*, 431 U.S. 324 (1977), is applicable in housing discrimination cases to establish a cause of action for an individual who seeks housing but does not formally apply because she reasonably believes it would be futile in the face of discrimination.

Respectfully submitted,

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necessarily show that there was a "policy" of discrimination, however, in every case in which the futile act theory is applied, although in most cases that will be the only way to show that the plaintiff would have been rejected had she applied. Where, for example, the plaintiff was told by a prospective employer that she will not get the job because she is black, and plaintiff can prove that, defendant's response that it has hired a number of blacks would not preclude plaintiff from satisfying the threshold *Teamsters* test.